

CAT - One Pager Report

Last Update: 05/02/2017

Municipal Separate Storm Sewer System (MS4) Permitting - David Webster (OEP)

HOT

BACKGROUND: Stormwater is the leading cause of water quality problems in Massachusetts and New Hampshire with waters impaired due to contaminated runoff. Tackling this problem is critical to cleaning up rivers, lakes, and ponds, and delivering clean water. There are five existing or planned MS4 permits in Massachusetts and New Hampshire: Boston, Worcester, Massachusetts Department of Transportation, and two general permits that cover remaining communities in Massachusetts and New Hampshire that require stormwater permits.

STATUS OF WORK: A final MA MS4 General Permit was issued in April 2016. A final NH Small MS4 General Permit was issued in January 2017. EPA is working on draft permits for MassDOT and Boston and a final or re-draft for Worcester. The MA MS4 GP has been challenged by the Center for Regulatory Reasonableness and four other parties. The case has been consolidated in the DC Circuit Court and is awaiting briefing schedules from the court. Two petitions for review of the NH Small MS4 general permit have been filed so far by the Conservation Law Foundation (in the First Circuit Court of Appeals) and CRR (in the D.C. Circuit; on March 24, 2017, CLF moved to intervene in the CRR's D.C. Circuit petition). Parties have until June 1, 2017 to file an appeal. EPA has moved to transfer CLF's petition in the First Circuit to the D.C. and consolidate it with CRR's petition. CLF has objected to the transfer and argues that all petitions filed on the NH small MS4 GP must be heard in the First Circuit. On March 29, 2017, EPA filed a motion in the D.C. Circuit to hold the matter in abeyance for 90 days, that is, until June 29, 2017. A 90-day stay of proceedings would allow time for any additional petitions for review of the EPA action at issue in this case to be filed before any further proceedings take place. On March 30, 2017, the court granted this motion. The deadline for dispositive motions and the certified index to the administrative record is July 16, 2017.

On March 30, 2017, the D.C. Circuit established a briefing schedule for the MA MS4 appeal. However, on April 19, 2017, CRR filed a motion to hold the briefing schedule in abeyance for 90 days. On April 21, 2017, the DC Court granted the motion. The briefing schedule ordered on March 30, 2017 which had petitioner's briefs due May 8, 2017, EPA brief due July 24, 2017 and final briefs due September 28, 2017 has been suspended. Parties must file any motions to the court by July 20, 2017 regarding governing of future proceedings. OGC, ORC, and DOJ continue to discuss at which point to offer to explore ADR through DC Circuit's mediation program.

SENSITIVE ISSUES: There is often keen municipal, state, non-government organization (NGO), and congressional interest in MA and NH municipal permits. In a March 9, 2017, letter to Administrator Pruitt, NH Governor Sununu raised concerns about the cost to municipalities of complying with the small MS4 permit and invited the Administrator to come to NH to meet with local and state leaders who would be impacted by the permit. In a January 25, 2017, letter to Administrator Pruitt, CRR raised concerns about the permit's cost to municipalities in both NH and MA as well as the science supporting the permits and requested the new administration review these MS4 permits.

In MA and NH, currently EPA Region 1 has the sole responsibility of issuing, justifying, and defending limits in a litigious atmosphere that is charged with public, financial, and environmental interests. Issues include whether the permit is adequately protective, affordable, and/or defensible under the law. The Region is currently considering whether to seek an assessment of the viability of alternative dispute resolution (ADR) to assist in the resolution of

these two cases.

PARTNERS: MA, NH

Date	Milestone	Status
06/30/2017	Issue Draft MassDOT MS4 permit.	Planned
07/17/2017	Submission of certified index of the record for the NH small MS4 General Permit to court	Planned
07/20/2017	Deadline for parties in the MA MS4 appeal to file motions for governing	Planned
09/29/2017	Issue Draft Boston MS4 permit.	Planned

Agenda 5/9/2017

1. Quick Review and updated agenda for today and 5/16 with modified issues list
2. Overview of the MA and NH permits and highlights of differences
3. Talk about commenters – [suggest a chart for future reference]
4. Discussion of key issues

5/9 suggested issues:

- MEP and the requirements that go beyond the specific elements of the Phase II rule in each of the permits
- Public participation
- Retention Requirements, IDDE requirements
- The water quality requirements of the two permits
- Compliance dates
- TMDLs and non-TMDL impaired waters
- Other water quality std exceedances

5/16 suggested issues

- Anything remaining from 5/9
- Flow, imperviousness, etc.
- Constitutional issues, including 10th amendment
- Cost, unfunded mandates

Also to discuss on 5/16:

- Review of the RTC for each of the permits
- Discussion concerning ADR and perspectives on the litigation

(1) Mon 5/8 11-12:30 or 3:30-5:00

Note – I think it would be good to jump right into this conversation and provide an up-front overview, highlight source information, identify relevant goals, etc.

(2) Tues 5/9 10:30-12 or 3:30-5:00 or Wed 5/10 3-5

Note – I was hoping to do two conversations next week, and these are the only possible other times.

(3) *Mon 5/15 Generally available for most folks between 11:00-4:30.*

(4) Tues 5/16 2:00-4:00(4:30).

(5) *Wed 5/17 3:00-5:00*

A brief list off the top of my head about what we need to discuss, generally (in no particular order):

1. The juxtaposition of the two permits. What do they have in common and what distinguishes them.
2. Compliance dates and compliance schedules for WQS.
3. ~~Revised Phase II regs issued in January 2017 (after the MA permit and before NH)~~
4. ~~The regulatory and litigation background, generally~~
5. Flow, imperviousness, etc.
6. MEP, the six minimum measures, and beyond
7. Retention requirements
8. Public participation
9. Water quality-based effluent limits and stormwater permitting
10. Applicable TMDLs – and misunderstandings about TMDL implementation
11. The WQBELs in these permits and how they work, including off-ramps and alternative measures
12. The 10th amendment and any other constitutional issues
13. Cost, unfunded mandates, etc.
14. Who commented and the structure of the RTC
15. What we need to keep in mind in deciding how best to proceed in the two lawsuits and ADR

EPA/MA DEP Meeting
Monday, July 10
EPA, Mt Katahdin, First Floor
11:00 – 12:30

1. Update on permit stay at EPA and MassDEP
2. Discussion of outreach on the permit stay to MA munis – use of SW News, etc.
3. Revisit (due to stay of permit) discussion of assistance and outreach topics for MA munis for rest of the year
4. Collaboration with MA stormwater coalitions
5. Review of OneNote site calendar, etc.
6. Other topics as identified

**United States Environmental Protection Agency
("EPA") National Pollutant Discharge Elimination
System ("NPDES")**

**POSTPONEMENT OF THE JULY 1, 2017 EFFECTIVE
DATE OF GENERAL PERMITS FOR STORMWATER
DISCHARGES FROM SMALL MUNICIPAL SEPARATE
STORM SEWER SYSTEMS IN MASSACHUSETTS**

Pursuant to § 705 of the Administrative Procedure Act ("APA") (5 U.S.C. § 705), and for the reasons stated below, the EPA hereby postpones the effective date of the EPA-issued General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems ("MS4s") in Massachusetts ("Massachusetts permit") from July 1, 2017 to July 1, 2018.

I. Background

EPA Region 1 issued the Massachusetts permit on April 4, 2016, with an effective date of July 1, 2017. Region 1 issued the previous general permit for Small MS4s in Massachusetts in 2003, which expired and was administratively continued for MS4s covered under that permit in 2008. EPA Region 1 issued the 2016 Massachusetts permit following issuance of the Commonwealth's CWA section 401 certification by the Massachusetts Department of Environmental Protection ("MassDEP"). The final 2016 permits were jointly issued by EPA and MassDEP, along with EPA's 632-page Response to Comments document.¹

The Massachusetts Permit allows eligible small MS4s in Massachusetts to obtain NPDES permit coverage for their stormwater discharges. Approximately 260 towns and other municipalities, which include a number of state and federally owned entities such as colleges, Veterans Administration hospitals, prisons and military bases in Massachusetts, are eligible to seek coverage under the permit.

Several parties filed petitions for review of the Massachusetts permit in the U.S. Court of Appeals for the D.C. Circuit. Petitioners are the Center for Regulatory Reasonableness ("CRR"), Conservation Law Foundation/Charles River Watershed Association, National Association of Homebuilders, the City of Lowell, and the Town of Franklin. The D.C. Circuit has consolidated these petitions. See *Center for Regulatory Reasonableness, et al. v. EPA*, No. 16-1246 (D.C. Circuit).

¹ Although the Region issues NPDES permits in Massachusetts, the Commonwealth maintains separate permitting authority under Massachusetts law. See Mass. Gen. Laws ch. 21, § 43; Mass. Code Regs. tit. 314. When the Region issues an NPDES permit in Massachusetts, MassDEP typically jointly issues a permit under state law. See *In re City of Marlborough*, 12 E.A.D. 235, 236 n.3 (EAB 2005); *In re Westborough*, 10 E.A.D. 297, 300 n.2 (EAB 2002). EPA's action in postponing the effective date of the Massachusetts permit does not affect the requirements of the permit issued by MassDEP under Massachusetts law.

On April 21, 2017, the D.C. Circuit granted CRR's motion to indefinitely stay the briefing deadlines. Under the original briefing schedule, petitioners would have filed their opening briefs on May 8, 2017. CRR cited several justifications in its motion to stay the original briefing deadlines, including providing time for the New Hampshire small MS4 general permit's judicial review period to end, providing time to address certain questions about the administrative record, and deadlines that the petitioners were facing in non-related litigation. EPA did not oppose this motion. Motions to govern further proceedings are due July 20, 2017.

On May 26, 2017, three of the petitioners (the Massachusetts Coalition of Water Resources, the City of Lowell, and the Town of Franklin, hereafter the "Requestors") submitted a letter asking EPA Region 1 to postpone the July 1, 2017 effective date for one year pending judicial review under section 705 of the APA.

II. Discussion

Upon consideration of the request, and for the reasons set forth below, EPA has determined that justice requires postponement of the effective date.² Therefore, pursuant to APA section 705, EPA hereby postpones the July 1, 2017 effective date for one year to July 1, 2018. EPA will provide notice of this postponement to the public, including all petitioners, all commenters, and all known potential permittees.

A. The Request

The Requestors' May 26 letter asks EPA to postpone the July 1, 2017 effective date of the Massachusetts permit in the "interests of justice" because, the Requestors assert, (1) the permit represents a significant expansion of EPA's CWA authority and the court must decide, among other things, whether EPA acted within its bounds by requiring that discharges meet water quality standards in addition to meeting the Maximum Extent Practicable ("MEP") standard; (2) it will align the Massachusetts permit's effective date with the effective date of the virtually identical New Hampshire small MS4 general permit, which was issued in January 2017, raises the same legal issues, and has also been challenged in the D.C. Circuit (as well as the 1st Circuit); and (3) although irreparable harm is not required for EPA to postpone the effective date under APA section 705, without it the towns will suffer irreparable harm by immediately expending resources that may ultimately prove to be unnecessary and wasted to avoid non-compliance and risk of enforcement.

B. Analysis

EPA finds that justice requires postponing the July 1, 2017 effective date of the Massachusetts

² The Region 1 Regional Administrator is authorized to act on behalf of EPA in this matter pursuant to 40 C.F.R. § 124.19(l), which grants regional administrators the authority to issue final NPDES permit decisions, which includes determining when a permit will take effect.

permit for one year pending judicial review. EPA would like to explore the use of alternative dispute resolution ("ADR") in this case in order to engage with the various petitioners and jointly see if there might be a resolution that could avoid the need for litigation. EPA believes that it is fair to postpone the effective date of the permit so that eligible MS4s in Massachusetts that could seek coverage under the permit would not be subject to enforceable permit terms and conditions under the Massachusetts permit that could change as a result of ADR. Postponing the effective date for one year pending judicial review should give EPA ample time to determine what, if any, changes are appropriate in the permit and to determine next steps.

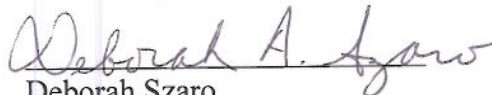
Pending any such decision by the Agency, postponing the effective date of the permit for one year will postpone certain obligations – and the associated costs – that would otherwise be incurred in the first year's implementation of the Massachusetts permit. Such costs would include monetary and staff time for preparation and submittal of a Notice of Intent ("NOI") to be covered by the permit. Also in the first year, in the absence of the postponement of the permit's effective date, the MS4s would have to update portions of their existing Stormwater Management Plans. Given the status of the litigation, the possibility that the parties will engage in ADR and that the Agency may decide to make changes to the permit, the Agency believes it is reasonable to defer imposition of these obligations and costs for the period of the postponement.

Moreover, postponing the effective date by one year will have the benefit of matching the Massachusetts permit's effective date with the effective date of the New Hampshire small MS4 general permit, which EPA Region 1 issued on January 18, 2017 and will take effect on July 1, 2018. Various parties have filed petitions for review of the New Hampshire permit in the D.C. Circuit, as well as one petition in the U.S. Court of Appeals for the First Circuit. EPA is also interested in exploring the use of ADR in that case. EPA has filed a motion with the First Circuit to transfer the petition that was filed there to the D.C. Circuit so that all of the New Hampshire petitions may be consolidated. Aligning the effective dates could promote efficiency in the resolution of both cases by facilitating the development of a unified ADR process that would address those issues raised in both permit appeals.

C. Conclusion

Based on the above, EPA concludes that justice requires postponement of the effective date. Thus EPA hereby postpones the July 1, 2017 effective date of the Massachusetts permit for one year to July 1, 2018.

6/29/17
Date


Deborah Szaro
Acting Regional Administrator
EPA Region 1

CENTER FOR REGULATORY REASONABLENESS

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SUITE 701
WASHINGTON, DC 20006
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FAX: 202-463-4207
www.centerforregulatoryreasonableness.org

January 25, 2017

VIA EMAIL & FIRST CLASS U.S. MAIL

Mr. E. Scott Pruitt
Administrator (Designate)
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Don Benton
Mr. Charles Munoz
Office of the Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Review of EPA's Small MS4 Stormwater General Permit for New Hampshire Request for Immediate Action

Dear Administrator Pruitt:

The Center of Regulatory Reasonableness ("CRR") on behalf of the New Hampshire Stormwater Coalition (a group of 20 affected New Hampshire cities) requests your formal review of a host of new requirements that EPA has sought to impose arbitrarily and without authority on small Municipal Separate Storm Sewer System (MS4) dischargers in New England. The final permit action for New Hampshire was announced by EPA Region I on January 18, 2017, just two days before President Trump took office, knowing that his new Administration would never countenance the action. Federal Register publication has yet to occur regarding the New Hampshire permit and should be prevented so that the new mandates can be rationally reconsidered in light of the actual requirements contained in the Act and the adopted NPDES rules. The following provides some brief background on this request.

This latest federal action in New Hampshire mirrors EPA's earlier decision to issue a dramatically more restrictive small MS4 general permit to Massachusetts communities in April 2016. That general permit is presently under appeal in the D.C. Circuit Court of Appeals by a host of municipal entities (including CRR) due to the extreme costs of compliance and EPA's failure to follow its adopted rules applicable to MS4 permitting. *See, CRR, et al v. EPA* (D.C. Cir. 16-1246). Although applicable stormwater permitting rules have not changed, both of these new MS4 permits are *5 times the length* of the prior permit and are projected to impose *\$5-10 billion in new compliance costs* over a 10 year period causing real economic harm to small

CENTER FOR REGULATORY REASONABLENESS

E. Scott Pruitt
January 25, 2017
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communities in New England.¹ Our analysis confirms that the new mandates EPA imposed suffer from an array of legal and scientific infirmities, and plainly exceed statutory authority by (a) creating new discharge prohibitions that are nowhere contained in the adopted NPDES stormwater rules or the Clean Water Act, (b) creating a presumption that the discharge causes adverse water quality impacts contrary to the express language of the Act and existing rules, (c) eliminating schedules of compliance allowable under state law and exposing cities to immediate citizen suit action, and (d) by seeking to control individual land use planning actions under the rubric of an “antidegradation” review. Taken as a whole, one would be hard pressed to fashion a more arbitrary and abusive set of federal requirements in an NPDES permit.

These new EPA mandates, which have never been subjected to the federal APA rulemaking process or notice under the Congressional Review Act, represent dramatic revisions to EPA’s existing MS4 program. Beyond the numerous legal infirmities, the new permit also created a massive increase in testing and reporting, even though no federal laws had changed and no specific analyses warranted such action. To date, hundreds of millions of dollars have been spent in an effort to comply with the prior federal stormwater permit mandates. But *billions* more will be necessary to address these *ad hoc* mandates if EPA’s regulatory agenda is left unchecked. Therefore, consistent with President Trump’s recent action entitled “Regulatory Freeze Pending Review” we ask that this arbitrary action may be promptly stopped and reasonably reconsidered.

It is our view that the major objections to the permit can be resolved easily through an objective comparison of the new mandates to the existing rules. We would hope that the Trump Administration would not countenance EPA’s costly action that so plainly violates the “rule of law” that is supposed to govern federal agency activities and the issuance of NPDES permits.

We look forward to your response in this matter.

Sincerely,



John C. Hall
Executive Director
Center for Regulatory Reasonableness

cc: Governor, Chris T. Sununu
Clark Freise, Assistant Commissioner, NHDES

¹ The enormous size of the new Region 1’s MS4 permit (exceeding 250 pages with appendices) is indicative, alone, of the significant new substantive requirements contained therein. Prior EPA issued/approved general MS4 permits were typically 20-30 pages long.

**Examples of Arbitrary and Abusive Provisions Contained in
New Small Community MS4 Permit
Nowhere Found in Adopted NPDES Rules or Statute**

Provision 2.1.1(a) prohibits any discharge from “causing or contributing” to any water quality standard exceedance thereby creating immediate exposure to citizen suits and eliminating allowable schedules of compliance.

“The permittee shall reduce the discharge of pollutants such that discharges from the MS4 do not cause or contribute to an exceedance of water quality standards.”

Analysis: Under EPA’s existing (albeit legally flawed) interpretation, the mere presence of a pollutant of concern (regardless of cause – e.g., natural occurrence or degree of significance) is grounds for claiming permittee is “causing and contributing” and therefore in violation of the provision. This prohibition does not exist in the adopted NPDES rules applicable to existing dischargers, is contrary to decades of NPDES program implementation and, in any event, schedules of compliance are authorized to avoid creating non-compliance in these situations while analysis and remediation efforts are ongoing.

Provision 2.1.2(a)-(b) specifies no new development may occur that increases any pollutant loading (or flow) anywhere in the MS4 system.

“Any increased discharge (including increased pollutant loadings) through the MS4 to waters of the United States is subject to New Hampshire antidegradation regulations. The permittee shall comply with the provisions of N.H. Code Admin. R. Part Env-Wq 1708.04 and 1708.06 including information submittal requirements and obtaining authorization for increased discharges where appropriate.”

Analysis: EPA falsely claims that state antidegradation rule compliance applies to the review of all pollutant impacts of individual local land use planning and development decisions. It does not. This new provision also violates CWA statutory scheme that only imposes a Maximum Extent Practical (“MEP”) standard on the overall MS4 community and exceeds statutory authority by seeking to regulate the every individual component of MS4 decision making. The Act does not give EPA authority to federalize local land use planning determinations via the federal antidegradation policy.

Provision 2.2.2(a)-(e) creates a presumption that more restrictive MS4 remedial measures are required if the MS4 discharges upstream of a listed impaired water and the pollutant is contained in MS4 discharge.

If there is a discharge from the MS4 to a water quality limited waterbody where pollutants typically found in stormwater (specifically nutrients (Total Nitrogen or Total Phosphorus), solids (Sedimentation/Siltation or Turbidity), bacteria/pathogens (Enterococcus, fecal coliform, or Escherichia Coli), chloride (Chloride), metals (Cadmium, Copper, Iron, Lead or Zinc) and oil and grease (Oil Slicks, Benzo(a) pyrene (PAHs)) are the cause of the impairment and there is not an approved TMDL, or the MS4 is located in a town listed in Part 2.2.2.a.-e. the permittee shall comply with the provisions in Appendix H applicable to it.”

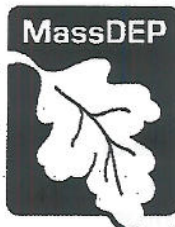
Analysis: This provision is expressly contrary to adopted NPDES rule (40 C.F.R. § 122.44(d)) that mandates EPA, as the permit writer, is responsible for confirming (with evaluations/analyses) the need to

regulate a discharge more restrictively and ignores that other factors may be responsible for the impairment (e.g., natural weathering (aluminum), low flow conditions or agricultural sources causing bacteria exceedance).

Provision 2.1.1(d) creates an impossibly strict compliance schedule (60 days) for addressing any newly discovered water quality standard or permit condition violation associated with the discharge:

"[I]f a pollutant in a discharge from the MS4 is causing or contributing to a violation of applicable water quality criteria for the receiving water, the permittee shall, as expeditiously as possible, but no later than 60 days of becoming aware of the situation, reduce or eliminate the pollutant in its discharge such that the discharge meets applicable water quality criteria."

Analysis: This provision has no basis in federal law and improperly negates state schedule of compliance authority which is intended to avoid placing dischargers in ongoing non-compliance. Sixty days is a patently arbitrary compliance deadline that is unrealistic when addressing complex water quality impairment issues. Imposing immediate compliance responsibilities without opportunity for notice and comment regarding the nature of the new requirement violates Section 101(e) of the Act.



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Matthew A. Beaton
Secretary

Martin Suuberg
Commissioner

August 14, 2017

Re: General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4) in Massachusetts

Dear MS4 Regulated Entity:

This determination is in response to 28 emails received from individual municipalities and one municipal coalition (see correspondence list attached) requesting the Department to revise the schedule for compliance contained in the 2016 renewal of the General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems ("MS4s") in Massachusetts ("Massachusetts Permit") pursuant to M.G.L. c. 21, § 43(4).¹ These requests were made in light of the recent action by EPA Region 1 to postpone the effective date of the EPA-issued general permit.

In 2016, MassDEP agreed to co-issue the Massachusetts Permit with EPA Region 1 in order to continue to be involved with EPA, cities and towns, and other stakeholders on how the Massachusetts Permit is implemented. MassDEP has made it a priority to work closely with EPA, communities, and stormwater coalitions to facilitate communication about permit requirements, to provide technical assistance to municipalities and coalitions, and to expand areas where sharing information and resources and innovative thinking can help cities and towns comply.

In light of the federal postponement, and given our goal to establish a coordinated federal-state implementation process, I find that good cause exists, for which permittees are not at fault, to revise the current state permit deadline for submittal of Notices of Intent. Given that coverage under the state-issued general permit is dependent upon EPA Region 1's issuance of written authorization following submittal of a Notice of Intent, and opportunity for public notice and comment, I note that it would be an exercise in futility to continue to require permittees to submit their Notices of Intent by September 29, 2017.

¹ M.G.L. c. 21, § 43(4) provides, in relevant part, "[t]he director may, upon request of a permittee, revise a schedule of compliance in an issued permit if the director determines that good and valid cause, for which the permittee is not at fault, exists for such revision, and in such cases the provisions of this paragraph for public notice and hearing shall not apply."

This information is available in alternate format. Contact Michelle Waters-Ekanem, Director of Diversity/Civil Rights at 617-292-6751.

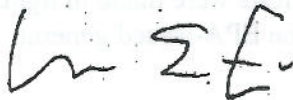
TTY# MassRelay Service 1-800-439-2370
MassDEP Website: www.mass.gov/dep

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Accordingly, to align with the revised effective date of the EPA-issued general permit, permittees seeking coverage under the state-issued general permit should submit their Notices of Intent, as otherwise required by part 1.7.3. of the state permit, within 90 days of July 1, 2018 (i.e., by September 29, 2018) or on such earlier date as may be required by EPA or a court upon judicial review. Additionally, such permittees should submit their Stormwater Management Plans, as required by part 1.10.a., and modified BMPs, as required by part 1.10.b., by July 1, 2019, or on such earlier date as may be required by EPA or a court upon judicial. Finally, all other compliance deadlines included in the state-issued permit shall be extended for one year, as we understand was done by the federal decision, accordingly, to align with the revised federal permit compliance deadlines, or to such earlier dates as may be required by EPA or a court upon judicial review.

As you know, the 2003 general permit for Small MS4s in Massachusetts has been administratively continued for MS4s covered under that permit since 2008, and it remains in force and in effect. Permittees should be mindful of their obligation to comply with all conditions of the 2003 general permit, including the requirement to annually evaluate the compliance of permittees' storm water management programs with the conditions of the 2003 permit and the appropriateness of the selected BMPs under Part II.D., until coverage is obtained under the 2016 general permit or an individual permit.

Sincerely,



Douglas E. Fine
Assistant Commissioner

Enclosure: Correspondence List

cc: Deborah Szaro, Acting Administrator, EPA Region 1

Correspondence List Regarding MassDEP's MS4 Permit Timeline – August 14, 2017

North Reading	Andrew Lafferty Director of Public Works	August 14, 2017
Orleans	John Kelly Town Administrator	August 11, 2017
Waltham	Stephen Casazza City Engineer	August 9, 2017
Wakefield	Claire Moss Stormwater/Project Manager	August 7, 2017
Fairhaven	Vincent Furtado Public Works Superintendent	August 4, 2017
Bellingham	Donald DiMartino Department of Public Works Director	August 4, 2017
Boxborough	Adam Duchesneau Town Planner	August 4, 2017
Worcester	Paul Moosey Commissioner DPW & Parks	August 4, 2017
Spencer	Stephen Tyler Superintendent Facilities and Utilities Office	August 4, 2017
Hadley	David Nixon Town Administrator	August 4, 2017
Sturbridge	Gregory Morse Department of Public Works Director	August 4, 2017
Lowell	Mark Young Executive Director Lowell Reg'l Wastewater Utility	August 4, 2017
Westfield	Joseph Keitner Stormwater Coordinator, DPW	August 4, 2017
Beverly	Mayor Michael Cahill	August 3, 2017
Dedham	Jason Mammone Director of Engineering	August 3, 2017
Braintree	Robert Campbell Town Engineer	August 3, 2017
South Hadley	Melissa Labonte Water Pollution Control Compliance Manager	August 3, 2017
Sterling	William Tuttle Department of Public Works Superintendent	August 3, 2017
Concord	Richard Reine Public Works Director	August 3, 2017
Milford	Richard Villani Town Administrator	August 3, 2017
Belchertown	Steven Williams Director of Public Works	August 3, 2017
Northborough	Scott Charpentier Director of Public Works	August 3, 2017
Wayland	Thomas Holder Director Department of Public Works	August 3, 2017
Chicopee	Quinn Lonczak Project Supervisor Water Pollution Control	August 3, 2017
West Boylston	Anita Scheipers Town Administrator	August 3, 2017
Leominster	Mark Piermarini Assistant Director of Public Works	August 3, 2017
Springfield	Joshua Schimmel Executive Director Water and Sewer Commission	August 2, 2017

Massachusetts Coalition for Water Resources Stewardship

Members:

Charles River Pollution Control District	City of Attleboro	City of Beverly
City of Brockton	City of Haverhill	City of Holyoke
City of Leominster	City of Melrose	City of New Bedford
Greater Lawrence Sanitary District	Town of Brookline	Lowell Regional Wastewater Utility
South Essex Sewerage District	Town of Concord	Town of Concord
Town of Dedham	Town of Framingham	Town of Franklin
Town of Holden	Town of Milford	Town of Pepperell
Town of Wayland	City of Chicopee	City of Peabody
City of Salem	City of Worcester	Town of Bellingham
Town of Danvers	Town of Marblehead	Town of Medway
Town of Millbury	Town of Wilbraham	
Upper Blackstone Water Pollution Abatement District	Springfield Water and Sewer Commission	

August 3, 2017



WELCOME

Massachusetts Stormwater News is a collaborative effort of the Massachusetts Department of Environmental Protection (MassDEP) and the New England office of the U.S. Environmental Protection Agency (EPA). This newsletter will be sent via email every few months to provide information to municipalities and others related to the Massachusetts Small Municipal Separate Storm Sewer System (MS4) permit. MA Stormwater News will feature topics of interest, provide updates on upcoming permit deadlines and highlight assistance resources from MassDEP, EPA and others.

EPA and MassDEP know that stormwater management is just one of the many challenges facing municipalities. We are committed to working with municipalities as you move forward on permit implementation.

This inaugural issue discusses municipal collaboration and the need for town departments beyond the Department of Public Works (DPW) to play a role in implementing the MS4 permit requirements. In this issue we also highlight some upcoming assistance and outreach resources from the EPA and MassDEP.

Setting Your Town Up for Stormwater Success: Involve Municipal Departments Beyond the DPW

EPA and MassDEP issued a new small MS4 general permit in April 2016. As municipalities plan to meet the requirements of the reissued permit, EPA and MassDEP encourage municipalities to involve all the departments that may play a role in meeting the requirements of the permit. The permit requires municipalities, among other things, to maintain stormwater systems, track and eliminate illicit discharges, sweep roads, and clean catch basins. While these are typical activities for a DPW, the permit also has other requirements that don't typically fall within the expertise of the DPW and may require the involvement of other municipal departments.

The permit requires several municipal departments to play an active role in the MS4 program. With permit tasks ranging from public education, to removal of illicit discharges, to assessing existing regulations affecting the creation of impervious cover or management of open spaces and municipal buildings, municipal departments such as Building and Parks and Recreation, as well as other boards or commissions such as Planning, Zoning, and Conservation, will need to be actively involved in meeting the permit requirements. School, Police and Fire Departments may also be involved (e.g., a curriculum related to stormwater; enforcement of illegal dumping; knowledge of industrial chemical use and storage, etc.), but to a lesser extent than the other departments previously mentioned.

Precisely what the different departments and/or boards will do is up to each individual municipality. There is no prescribed

approach and each municipality is free to determine what works best. For example, when figuring out how to meet the requirement in the 2016 permit to retain as-built drawings that depict all structural and non-structural stormwater controls for new developments and redevelopments, many town departments may be involved. That task may involve: 1) the DPW, which may track where structural controls are located that need to be maintained by the municipality; 2) the Building Department, which may retain the files that locate the stormwater controls and the Operation and Maintenance (O&M) plans associated with each stormwater control; and 3) the Zoning Board, Planning Board and/or Conservation Commission which may take the lead for requiring specific stormwater controls and evaluating the sufficiency of O&M plans.

Other areas of the MS4 permit that may involve more than one municipal department and/or board include:

- **Construction Site Stormwater Runoff Control.** This measure involves procedures for construction site inspections, local sediment and erosion control regulations that require use of appropriate best management practices (BMPs) at construction sites, and site plan review which includes procedures for consideration of water quality impacts.
- **Stormwater Management for New Development and Redevelopment.** This measure aims to reduce the discharge of

EPA and MassDEP are pleased to make MS4 communities aware of two key outreach documents that are now available:

- Stormwater Management: MA MS4 Permit, First Year Requirements: <https://go.usa.gov/x5SD2>
- Summary of Six Minimum Control Measures: <https://go.usa.gov/x5hVX>

pollutants from new development and redevelopment through the use of stormwater retention or treatment. This includes an update of local ordinances, assessment of local regulations impacting the creation of impervious cover, and identification of five municipal properties with the potential for modifications or retrofits to reduce runoff.

- **Good Housekeeping for Municipal Operations.** This measure requires operation and maintenance plans for parks and open space, municipal buildings (schools, police and fire), vehicle maintenance garages as well as for traditional infrastructure. It also requires transfer stations and public works yards to develop and implement specific plans to prevent and reduce pollution washed into stormwater runoff.

Early communication and coordination between municipal departments and/or boards will help foster compliance with the MS4 permit. Municipal budget season is upon us, and municipalities can begin estimating the cost to implement the new MS4 permit.

EPA has a cost estimator that municipalities can use to estimate MS4 program costs. A link to the cost estimator can be found on EPA's Massachusetts Small MS4 General Permit homepage: <https://go.usa.gov/x5dgb>

Upcoming Assistance from EPA and MassDEP



- **“Introduction to Global Positioning Systems (GPS) for Stormwater Outfall Mapping,”** Webinar, May 31, 2017, 2:00-3:30 p.m.
<https://attendee.gotowebinar.com/register/7066951940918423809>
- **“Completing a Notice of Intent (an NOI) for Approval to Discharge under the 2016 Massachusetts Small MS4 General Permit,”** Webinar, June 22, 2017, 1:00 - 2:30 p.m.
<https://register.gotowebinar.com/register/4415012358275674114>
- **“A Walk-Through of the Illicit Discharge Detection and Elimination (IDDE) 2016 MS4 Permit Requirements,”** Recorded Webinar, Coming Soon!
- **Stormwater Nutrient Management Optimization Tool (Opti-Tool) Training,** Summer 2017
- **Best Management Practices Accounting and Tracking Tool (BATT) Training,** Summer 2017
- **Soak Up the Rain Webinar Series and Customizable Public Outreach Tools:**
<https://go.usa.gov/x5zn2> and <https://go.usa.gov/x5znT>
- **The MS4 permit requires each town to implement a public education and outreach program that reaches four different audiences and that includes messages that are most relevant to that community.** Town officials can click on the links below to download - and save - brochures, pamphlets and other materials and use those to help comply with Section 2.3.2.c of the MS4 permit: <https://go.usa.gov/x5dgr>
- **For “hands on” MS4 training and assistance for your community, call MassDEP’s Stormwater Coordinator at 617-292-5821**

Important Reminder: Annual Reports Now Due

For municipalities authorized under the 2003 MS4 permit, the Annual Report for the permits was due May 1, 2017. If you missed the deadline, reports are still being accepted.

May 1 2017

Stormwater News is a collaborative effort of the Massachusetts Department of Environmental Protection (MassDEP) and the New England office of the U.S. Environmental Protection Agency (EPA).

Specific questions about the permit should be directed to:

EPA: Newt Tedder - tedder.newton@epa.gov or 617-918-1038

MassDEP: Fred Civian - frederick.civian@state.ma.us or 617-292-5821

Suggestions for future topics, questions, assistance or requests to be added or removed from the MA Stormwater News mailing list can be sent to: StormwaterNewsMA@epa.gov

EPA-MassDEP MS4 Assistance Coordination Meeting

June 12, 2017 11:00 AM – 12:30 PM

MassDEP Conference Room 2212-A (2nd Floor)

Draft Agenda

1. Check-in on July issue of Stormwater News
2. Planning for October issue of Stormwater News
3. Check-in on status of One Drive/Share point
4. Communication/review protocols for documents
 - a. Documents co-issued by both agencies
 - b. Documents co-issued by one agency that speak on behalf of the other agency
5. Upcoming events
 - a. Trainings
 - b. Meetings with Towns
6. Other topics
7. Next steps

**Bowditch
& Dewey**
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May 26, 2017

*Via Email szaro.deb@epa.gov
And First Class Mail*

Ms. Deborah Szaro
Acting Regional Administrator
Regional EPA New England, Region 1
5 Post Office Square - Suite 100
Boston, MA 02109-3912

***Re: Request for Stay Pending Appeal of the 2016 Massachusetts Small Municipal
Separate Storm Sewer System (MS4) General Permit***

Dear Administrator Szaro:

We are writing you on behalf of the Massachusetts Coalition for Water Resources Stewardship, Inc. ("Coalition") and the City of Lowell to request that Region 1 of the Environmental Protection Agency (the "Region" or "EPA") stay the effective date of its 2016 Massachusetts MS4 Permit, 81 Fed. Reg. 21,862 (April 13, 2016) (the "MS4 Permit"), pending resolution of the ongoing appeal in the United States Court of Appeals for the D.C. Circuit. As demonstrated below, the Region has ample authority and justification to grant an administrative stay pending judicial review under 5 U.S.C. § 705.

The interests of justice requires a stay of the MS4 Permit pending judicial review. First, the MS4 Permit represents a significant expansion of EPA's authority under the Clean Water Act ("CWA"). The Court must decide, among other things, whether EPA exceeded its authority under the CWA by requiring that, in addition to meeting the Maximum Extent Practicable standard, municipal discharges also not cause or contribute to an exceedance of water quality standards. Absent a stay, the municipalities that are subject to the MS4 Permit will expend scarce public resources implementing its provisions that will cause them to set aside other

{Client Files/307207/0002/COR/04070618.DOCX;7}

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municipal priorities before the Court may complete review of this matter. Because the 2016 MS4 Permit is of *unprecedented scope and complexity*,¹ communities affected by it, and their citizens, should be allowed to maintain the status quo by continuing to implement those standards set by the 2003 MS4 Permit and avoid the burdens imposed by the 2016 MS4 Permit until the Court has had an opportunity to review and rule on the MS4 Permit's legality.

Second, the Region recently issued an NPDES General Permit for MS4s in New Hampshire ("NH MS4 Permit") that in form and substance is virtually identical to the MA MS4 Permit. The NH MS4 Permit has been appealed to the same court, Center for Regulatory Reasonableness v. U.S. Environmental Protection Agency, No. 17-1060 (D.C. Cir.), and the same legal challenges are expected. The effective date of the NH MS4 Permit is July 1, 2018. The effective date of the MA MS4 Permit is a year earlier, July 1, 2017. Where a Court will be reviewing the same issues in both the MA and NH MS4 Permit appeals, the effective dates and the compliance deadlines for these two permits should be consistent. An administrative stay of the MA MS4 Permit would achieve such consistency.

Finally, even though an irreparable harm finding is not required for the Region to issue an administrative stay, the municipalities that are subject to the MS4 Permit will suffer irreparable injuries if the MS4 Permit is not stayed pending judicial review. Municipalities must immediately expend resources that may prove to be unnecessary and wasted to avoid non-compliance and risk of enforcement. Those expenditures may ultimately be rendered misdirected following judicial review. Such wasted expenditures constitute irreparable harm. Given the far-reaching impact this permit will have on municipalities and their citizens who must ultimately pay for compliance,² and the uncertainty surrounding the authority of EPA to issue it,

¹ The MS4 Permit and Appendices total nearly 300 pages, and includes a major increase in data collection, management and reporting, operation and maintenance requirements, stormwater planning and assessment activities, compliance with TMDLs, major capital projects for stormwater improvements, and a significant increase in administrative costs.

² In Massachusetts Department of Environmental Protection's ("DEP") comments to EPA, DEP stated that "resources at the local level are scarce," that "the costs to implement the proposed MS4 permit are a major issue to be considered," that EPA should "recognize that costs will have significant effect on communities" and further suggested that EPA consider the timing needed for such significant resources. See EPA Response To Comments on National Pollutant Discharge Elimination System (NPDES) General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts, NPDES Permit Nos. MAR041000, MAR042000, MAR043000, Dated April 4, 2016 (hereinafter "RTC"), 1122.

Many towns echo this concern. The Town of Holden submitted a comment in response to the draft permit stating that its compliance with the 2016 MS4 Permit would result on an increase of 40 to 60 percent above its then-current costs each year. See RTC 1193-1194. Other municipalities' compliance resulted in 28-30 percent increases above its then-current costs annually. See RTC 1195.

justice and basic principles of good government require that EPA stay the MS4 Permit for the duration of judicial review.

I. BACKGROUND

A. Introduction and Procedural Background

The Coalition is a Massachusetts *non-profit* organization devoted to promoting watershed-based policies and regulations founded on scientifically-based and financially responsible approaches that effectively manage and conserve water resources. Approximately 40 Coalition members are municipalities and districts subject to the MS4 Permit and who are charged with implementing its provisions. The Coalition and the Town of Franklin filed an appeal of the MS4 Permit³ because it represents a significant expansion of EPA's authority under the CWA and imposes requirements that are overly prescriptive, burdensome and not likely achievable for most communities. The Coalition and the Town of Franklin are joined in the appeal by the City of Lowell, the National Association of Home Builders, and the Home

The Town of Rowley commented on competing local demands for funds in education, public safety, facilities and infrastructure upgrades, and noted that "the magnitude of the . . . permits will apparently require possible engagement of expensive consultants solely to guide implementation and direct future hiring of more full-time staff for those tasks." *See* RTC 1198. Rowley contends that "the projected costs of compliance are overwhelming." *Id.*

The Town of Shrewsbury noted that their town's residents have already seen significant increases in their water and sewer bills, and that "in order to acquire any funding for stormwater beyond current expenditures, the rates need to be equitable and there needs to be a proven costs-benefits analysis to support them." *See* RTC 1199.

The City of Haverhill commented that "competing demands and dwindling budgets will make complying . . . impossible for many municipalities, opening them up to potential enforcement action." *See* RTC 1206.

The Town of Weymouth noted that the costs to administer and implement the minimum controls measures . . . far exceed the Town's budget, and that essential programs would need to be reduced or eliminated in order to comply with the permit. *See* RTC 1208.

These excerpts are not exhaustive of towns and cities' comments; they provide only a sampling of the concerns Massachusetts municipalities face in evaluating the costs of compliance.

³ The Coalition's appeal is pending in the United States Court of Appeals for the District of Columbia Circuit, as *Center for Regulatory Reasonableness, et al., v. U.S. Environmental Protection Agency*, No. 16-1246 and consolidated cases.

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Builders Association of Massachusetts (collectively the “Massachusetts Petitioners”), and the Center for Regulatory Reasonableness (“CRR”).⁴

While the Coalition’s appeal was awaiting a briefing schedule from the Court, the Region issued the NH MS4 Permit on January 18, 2017. In form and substance, the NH MS4 Permit is virtually identical to the MA MS4 Permit. An appeal NH MS4 permit is pending in the D.C. Circuit. See CRR v. EPA, (D.C. Cir. 17-1060).⁵

The Coalition and the Massachusetts Petitioners’ appeals have been delayed by the issuance of the NH MS4 permit and the appeals of that permit that followed. The briefing schedule in the Coalition’s appeal in the D.C. Circuit is currently held in abeyance for 90 days, or until July 20, 2017, to see if the NH MS4 and MA MS4 Permit appeals become consolidated, and if so, to allow the parties to propose a briefing schedule. Practically, to provide the most efficient approach for the Court to review these matters, the MA and NH MS4 Permit appeals should be heard by the same court. Indeed, EPA has stated “[i]t would . . . be in the interests of judicial economy and the parties for challenges to both permits to be adjudicated by a single court.” Respondent EPA’s Reply in Support of Motion to Transfer and Hold Case in Abeyance for 120 Days, CLF v. EPA, Docket No. 17-1130 (1st Cir. Mar. 15, 2017). If the appeals, as we expect, are adjudicated by a single court and possibly consolidated, the Court’s review of the Coalition and the Massachusetts Petitioners’ arguments will be further delayed. The current deadlines of the MA MS4 Permit will occur before the Court has had any opportunity to consider the Petitioners’ arguments.

The effective date of NH MS4 Permit is July 1, 2018, a year later than the MA MS4 Permit. Where, as expected, the MA and NH MS4 Permit appeals are to be considered by the same Court and possibly consolidated, and the Court is reviewing the same issues, logic dictates that the effective dates and the deadlines of the MA and NH MS4 Permit be consistent. Justice requires the effective dates match. An administrative stay of the MA MS4 Permit would accomplish that.

⁴ Because CRR was the first to challenge the MA MS4 Permit in the D.C. Circuit, the administrative record was filed in that court, and the subsequent petitions filed in the First Circuit, including appeals filed by Conservation Law Foundation and Charles River Watershed Association, were transferred to D.C. Circuit and consolidated.

⁵ CLF filed a separate challenge to the NH MS4 Permit in the First Circuit. See CLF v. EPA, (1st Cir. 17-1130). Because of the similarities between the NH and MA MS4 permits, EPA has sought to transfer CLF’s First Circuit petition to the D.C. Circuit. USCA Case #16-1246 Document #1672208 Filed: 04/21/2017, Clerk’s Order - considering motion to hold case in abeyance [# 1671828-2], suspending briefing schedule; directing party to file motions to govern future proceedings by 07/20/2017 [16-1246, 16-1359, 16-1360, 16-1361, 16-1362]. The deadline to appeal the NH MS4 permit is June 1, 2017.

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B. MS4 Permitting under the CWA and the MS4 Permit

The Massachusetts Petitioners' challenge EPA's authority under the CWA to impose fundamental aspects of the MS4 and seek, as a remedy from the Court, remand to EPA for further review, reissuance and public comment, consistent with the law. The CWA was enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). CWA Section 301(a) prohibits "the discharge of any pollutant" by any person, except as authorized by the Act. 33 U.S.C. § 1311(a). To regulate these discharges, CWA Sections 301 and 304 authorize EPA to establish "effluent limitations," defined as restrictions placed upon pollutants that "are discharged from *point sources* into navigable waters." *Id.* §§ 1311, 1314(b), 1362(11) (emphasis added); *see also id.* § 1342(a)(1).

Under CWA Section 301, EPA must develop effluent limitations for "pollutants." 33 U.S.C. § 1311. The term "pollutant" has a specific meaning that is not open-ended, but limited, according to relevant case law. *See Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1978); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982).

CWA Section 402 provides an exception to CWA Section 301's pollutant discharge prohibition by establishing the National Pollutant Discharge Elimination System ("NPDES") permit program, provided that the pollutant discharges meet appropriate "effluent limitations" contained in an NPDES permit. 33 U.S.C. § 1342(a). The NPDES permit program limits pollutant discharges from "point sources" into U.S. waters through various practices or technologies. 33 U.S.C. §§ 1311(b)(2), 1314(b), 1316(b)(1)(B). Originally, Congress exempted some sources of water pollution from the CWA and NPDES permit program, including municipal stormwater discharges.

In 1987, Congress added CWA Section 402(p), which established a phased approach to regulating certain stormwater discharges. In Phase I, Congress required NPDES permits for stormwater discharges "associated with industrial activities" and "from" certain large and medium MS4s. 33 U.S.C. § 1342(p)(1)-(4). The industrial permit program mirrored the existing NPDES permit program for industrial and sanitary wastewaters. The new MS4 program was intended to have a more limited scope than traditional NPDES permits.

For Phase II, Congress instructed EPA to study all remaining stormwater discharges to determine the nature of pollutants in those discharges, and establish "procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality." *Id.* § 1342(p)(5). Based on that study, EPA was required to promulgate regulations designating any additional sources of stormwater discharges to be regulated and to establish a "comprehensive program to regulate such designated sources." *Id.* § 1342(p)(6).

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From the start, Congress recognized that municipal stormwater presented unique challenges and that different practices and technologies should apply than those of other NPDES permit programs. MS4 must manage enormous quantities of diffuse stormwater runoff, complex flood control management infrastructure, and the addition of pollutants from within and sometimes even outside their jurisdictional boundaries. Therefore, Congress limited EPA's NPDES permitting authority over MS4s to controlling the discharge of pollutants from the MS4 system to the maximum extent practicable (the "MEP Standard"). 33 U.S.C. § 1342(p)(3)(B)(ii)-(iii). As discussed in greater detail below, courts have consistently ruled that the MEP Standard is the only standard that MS4 discharges are required to meet, exempting them from the requirement to specifically meet water quality-based standards.

In May 2003, Region 1 implemented EPA's Phase II MS4 program by issuing its first Final General Permit for Stormwater Discharges from Small MS4s ("2003 MS4 Permit"). The 2003 MS4 Permit required small MS4s to develop and implement stormwater management programs to meet the MEP Standard. The 2003 MS4 Permit expired in 2008 and was administratively continued, in part because of the significant legal and technical challenges, as well as controversy regarding that permit program.

The 2014 Draft Massachusetts Small MS4 General Permit was released for public comment on September 30, 2014. EPA received over 1,300 individual comments during the comment period, by more than 150 entities, including the five parties that comprise the Massachusetts Petitioners. On April 4, 2016, EPA issued the 2016 MS4 Permit.

The MS4 Permit will become effective July 1, 2017. In order to obtain authorization to discharge, communities subject to the MS4 Permit must submit a complete and accurate Notice of Intent ("NOI") containing certain specific and detailed information set forth Appendix E of the MS4 Permit. The NOI must be submitted on or before September 29, 2017 (90 days from the effective date of the final permit). Communities must first satisfy the eligibility requirements of the MS4 Permit at Parts 1.2 and 1.9 prior to submission of their NOIs. The MS4 operator will be authorized to discharge under the permit only upon receipt of a written notice from EPA following a public notice of the submitted NOI. EPA will authorize the discharge, request additional information, or require the small MS4 to apply for an alternative permit or an individual permit.⁶

⁶ The MS4 Permit provides that "[n]on-compliance with any of the requirements of this permit constitutes a violation of the permit and the CWA and may be grounds for an enforcement action and may result in the imposition of injunctive relief and/or penalties." Part 1.5.

C. The Coalition and the Massachusetts Petitioners' Appeal

The Coalition and the Massachusetts Petitioners' appeal of the MS4 Permit has been delayed by the newly issued NH MS4 Permit, which does not take effect until July 1, 2018. As noted above, the MA MS4 Permit appeal is currently on hold awaiting the appeal deadline for the NH MS4 Permit to pass. While briefing in the Court is held in abeyance, the Coalition and the Massachusetts Petitioners' overarching position is that EPA exceeded its authority under the CWA in issuing a MS4 permit requiring that, in addition to meeting the MEP standard, municipal discharges must also not cause or contribute to an exceedance of water quality standards. The Coalition and other Massachusetts Petitioners' position, which is discussed in greater detail below, is that Section 402(p)(3)(b)(iii) of the CWA, which articulates the MEP standard, does not authorize EPA to include a requirement to meet water quality standards.

In addition to the challenge to EPA's imposition of water quality standards in the MS4 Permit, the Massachusetts Petitioners intend to raise other challenges to the validity of the MS4 Permit. Specifically, the Massachusetts Petitioners will argue (1) that the illicit discharge requirements in the MS4 Permit impose arbitrary and capricious procedural steps that are financially over-burdensome and have not been demonstrated to be necessary to achieve the identification and elimination of illicit discharges to the MS4; (2) that flow is not a pollutant and cannot be regulated as a proxy or surrogate to effect levels of pollutants already present within a waterbody; (3) that EPA's authority to control pollutant discharges does not encompass the ability to mandate land use decision-making; (4) that developed sites and impervious surfaces are exempt from NPDES permitting and EPA's adoption of such standards in the MS4 Permit are an attempt to circumvent the rulemaking process; (5) that the regulation of nonpoint source pollution was relegated by Congress to the states; and (6) that the permit is unclear, vague and otherwise fails to meet requirements of the APA in its Handbook and other references.⁷

The Center for Regulatory Reasonableness ("CRR") intends to argue that EPA's permit was unlawful because it (1) broadly imposes water quality-based limitations without a specific demonstration of need (e.g., convolutes the Maximum Extent Practicable standard and violates specific CWA provisions), (2) regulates flow, (3) regulates land use, and/or (4) imposes more restrictive requirements on the regulated community based solely on geographic location. In addition to these challenges of statutory authority, CRR intends to challenge EPA's unlawful promulgations and approvals of effluent limitations and other limitations under CWA § 509(b)(1)(E) by radically amending the MS4 Permit's "boilerplate" provisions, and that EPA amended its NPDES stormwater regulations, its water quality-based permitting regulation, and

⁷ This list is not exhaustive and represents only the general categories of arguments and/or issues that the Massachusetts Petitioners intend to present to the Court.

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its NPDES prohibition regulation without satisfying the requisite notice and comment rulemaking procedures. Finally, CRR intends to argue that EPA's application and/or imposition of the Maximum Extent Practicable standard is beyond the authority granted under the commerce clause, is void for vagueness, is unconstitutional as applied, and/or is an illegal delegation of authority.

II. EPA HAS AMPLE AUTHORITY TO GRANT A STAY

The Region has broad authority and discretion to stay the effective date of the MS4 Permit under Section 705 of the APA. APA Section 705 controls how EPA should consider and decide requests for administrative stays pending judicial review: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. The criteria that EPA must apply are significantly less stringent than the criteria generally used by the courts. The APA contrasts what is required for an administrative stay ("justice so requires") and a judicial stay ("conditions as may be required" and "irreparable harm"). 5 U.S.C. § 507.⁸ Such differences must be given effect, and even though the Coalition can show irreparable harm, there is no irreparable harm requirement for an administrative stay under the APA.

Absent a stay, the MS4 Permit will force municipalities to expend extraordinary public resources and put aside other essential programs and municipal priorities to comply with the MS4 Permit. See Footnote 2, *supra*. The communities and their citizens should not be compelled to suffer these harms until the Court has had an opportunity to review the legal challenges to the MS4 Permit. For these reasons, an administrative stay is appropriate.

III. A STAY IS WARRANTED EVEN UNDER THE MORE STRINGENT JUDICIAL STANDARD

While an administrative stay is warranted under the standards established by the APA, it would be justified even under the more stringent standard employed by the courts. In evaluating whether to grant a judicial stay, federal courts typically consider these factors: (1) whether the applicant has made a showing of likelihood of success on the merits of its underlying appeal; (2)

⁸ APA § Section 705 reads: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

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the degree to which the applicant will suffer irreparable harm absent a stay; (3) whether the issuance of stay will harm other parties; and (4) whether the public interest is served by granting the stay. Hilton v. Braunskill, 481 U.S. 770, 776-777 (1987); see also Standard Havens Products, Inc. v. Gencor Industries, Inc., 897 F.2d 511, 512 (Fed.Cir.1990). Like the courts, the Region need not give these factors equal weight, but should consider the factors in light of the circumstances. See Standard Havens Products, Inc., 897 F.2d at 512-13. To justify a stay, an applicant need not always establish a high probability of success on the merits. Ohio ex rel Celebrezze v. Nuclear Regulatory Com'n, 812 F. 2d at 290. The factors delineated are not "perquisites to be met". *Id.* Accordingly, when confronted with an appeal in which the balance of harm favors interim relief, the court may grant a stay if the movant merely has raised novel issues on appeal or has raised serious questions on the merits. Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F. 2d 150, 153-154 (6th Cir. 1991). Indeed, the court "may grant a stay even though its own approach may be contrary to movant's view of the merits." Holiday Tours, 559 F. 2d at 843. Again, this judicial test is not applicable to this request for an administrative stay, under APA Section 705. Nonetheless, it is instructive that each of the four factors weighs strongly in favor of granting a stay of the MS4 Permit pending judicial review.

A. Absent an immediate stay, Massachusetts communities will suffer irreparable harm

Absent a stay, the Permit will take effect on July 1, 2017. The Town, Coalition member communities, and other communities and entries in Massachusetts that are subject to the MS4 Permit will need to prepare their NOIs immediately - the submission deadline is September 29, 2017. The scope of the obligations that this MS4 Permit imposes is far beyond what prior MS4 permits have required. Additionally, planning for and instituting these initiatives is an arduous and expensive process that may later become moot, should the Court find that the Permit oversteps the bounds of what is permitted under the CWA. The Supreme Court acknowledged the gravity of such a position, noting that "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment); Texas v. United States Env'tl. Prot. Agency, 829 F.3d 405, 433 (5th Cir. 2016). In the Town, and indeed in many Massachusetts communities, each dollar is accounted for and serves a specific purpose for those communities. The prospect of expending significant sums of money in order to comply with a permit whose legality has not been tested is insuperable.

Avoiding compliance in the absence of a stay is similarly out of the question due to the threat of civil litigation and penalties under the CWA. Without a stay of the Permit, the Region and others could consider Massachusetts communities to be in violation of the Permit, should

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they fail to complete and file an NOI by September 29, 2017. MS4 Permit, Part. 1.5 (“[n]on-compliance with any of the requirements of this permit constitutes a violation of the permit and the CWA and may be grounds for an enforcement action and may result in the imposition of injunctive relief and/or penalties.”). The Region – or others who may bring citizen suits under the CWA – can maintain that the communities are violating the Permit, thereby exposing them to significant liability. 33 U.S.C.A. § 1365(a), (d); see Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992) (“when repetitive penalties attach to continuing or repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses - there is no adequate remedy at law”). Even if the Region were to agree not to pursue civil penalties in light of the pending litigation, such an agreement does not necessarily immunize the communities from citizen suits. See, e.g., Washington Public Interest Research Group v. Pendleton Woolen Mills, 11 F. 3d 883 (9th Cir. 1993). This exposure cannot be taken lightly: the Clean Water Act provides that a prevailing party in a citizen suit may be awarded the costs of litigation, including expert witness fees and attorney’s fees. 33 U.S.C.A. § 1365(d).

A stay pending the completion of litigation will ensure that these Massachusetts communities and their residents are not forced to suffer these harms until the Court has had a full and fair opportunity to review the Permit’s legality, and is an appropriate solution under the circumstances.

B. The Massachusetts Petitioners are likely to succeed on the merits

The merits of the Massachusetts Petitioners’ appeal further support a stay. As just one example, in its appeal, the Coalition will argue that EPA’s interpretation of Section 402(p)(3)(b)(iii) of the CWA, which articulates the Maximum Extent Practicable Standard, distorts both the plain meaning of the Section and the intent of Congress in enacting it.

The words of a statute must be read in their context and with a view to their place in the overall statutory scheme. Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427 (2014). An agency’s interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference. *Id.* EPA’s Permit inappropriately distorts the syntax of Section 402(p) of the CWA and the intent of Congress in enacting this provision. Drawing on the inherent distinctions between MS4 discharges and industrial stormwater and industrial and municipal wastewater discharges, Section 402(p) was added in 1987 and established a comprehensive new scheme for regulation of municipal stormwater. The opening clause of Section 402(p)(3)(b)(iii) states that, unlike industrial stormwater permits, MS4 permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . .” *Id.* Both the plain meaning of the words chosen by the Legislature and the statutory structure of this Section demonstrate that stormwater was never intended to be subject to water quality based standards.

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The legislative history of Section 402(p) bolsters this reading of the statute. Sen. Chafee, in discussing the 1987 revisions to the CWA, explained that those revisions “establishe[d] a new program to control pollution . . . from nonpoint sources . . . [such as] rain which washes off from city streets, or flows off of agricultural fields and is contaminated with pesticides and insecticides.” 133 Cong. Rec. S733-02, 1987 WL 928615 (remarks of Sen. Chaffee). He further noted that such revisions were intended to provide “an improved and less burdensome process for control of discharges of stormwater, particularly for municipalities.” 133 Cong. Rec. S733-02, 1987 WL 928615 (remarks of Sen. Chafee).

Sen. Stafford, who served on the conference committee for the 1987 revisions, explained the committee’s rationale for its unique approach to stormwater:

Mr. President, I would like to explain to my colleagues why a little more time is needed to develop a comprehensive municipal storm sewer program. **These permits will not necessarily be like industrial discharge permits.** Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees:

These are not permits in the normal sense we expect them to be. **These are actual programs.** These are permits that go far beyond the normal permits we would issue for an industry because they in effect are programs for stormwater management that we would be writing into these permits.

132 Cong. Rec. S16424-02, 1986 WL 789391 (remarks of Sen. Stafford) (emphasis added).

Sen. Durenburger explained during a Senate debate in January of 1987 that the bill “affords municipal and nonindustrial dischargers some relief from the 1972 permit application requirements. A permit for a municipal separate storm sewer . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable.” 133 Cong. Rec. 1279-80 (1987) (remarks of Sen. Durenberger) (emphasis added).

Each of these statements illustrate that the Maximum Extent Practicable Standard to which municipalities are held was intended to be a programs-based, management practices approach that recognizes the unique challenges presented in managing stormwater discharges. Such measures were taken by Congress because numeric end-of-pipe water quality based standards are an inappropriate response to this issue. Where Congress’s intent is clear, as it is here, the Court will enforce that intent, regardless of EPA’s interpretation. Nat. Res. Def.

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Council, Inc. v. EPA, 966 F.2d 1292, 1302 (9th Cir. 1992) citing Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 842-43 & n. 9 (1984), *aff'd*, 484 U.S. 1, 108 (1987).

Consistent with the plain language of CWA § 402(p)(3)(B)(iii) and the legislative history, courts have repeatedly held that “maximum extent practicable” is the only standard that applies to MS4 discharges. See NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992) (“In the 1987 amendments, Congress retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge . . . Congress could have written a statute requiring stricter standards, and it did not”); Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999) (holding that the structure of the Clean Water Act and precedent demonstrate that Congress did not require municipal storm-sewer discharges to comply with water quality standards); Miss. River Revival, Inc. v. City of St. Paul, No. CIV. 01-1887 DSD/SRN, 2002 WL 31767798, at *6 (D. Minn. Dec. 2, 2002) (noting that the Clean Water Act specifically exempts municipal storm water permittees from the requirement that water quality standards are met); City of Abilene v. EPA, 325 F.3d 657, 659-60 (5th Cir. 2003) (MS4 permits subject to the maximum extent practicable standard are “management permits” and distinct from “numeric end-of-pipe permits” like those issued for industrial stormwater).

The plain language of the statute is clear: municipal stormwater discharges were never intended to be subject to water quality based standards. The legislative intent supports such a reading of the statute, and case law has interpreted the Clean Water Act consistently with that reading. As such, the Coalition is likely to prevail on the merits of its appeal.⁹

C. The Balance of Equities Favors Granting A Stay

Unless a stay is granted, the Permit will impose severe and irreparable harm upon Massachusetts communities and their citizens by forcing them to spend resources to comply with a Permit that may ultimately be deemed unlawful. A stay pending appeal, like a preliminary injunction, is appropriate to maintain the status quo and preserve the court’s ability to render a meaningful judgment on the merits. Sun Microsystems, Inc. v. Microsoft Corp., 333 F. 3d 517, 525 (4th Cir. 2003). As it currently stands, Massachusetts communities bear an enormous risk in this matter. Should municipalities choose to forbear action on the Permit, they expose themselves to exorbitant civil penalties and citizen suits under the CWA. Conversely, the municipalities may sink hundreds of thousands of dollars into non-recoverable compliance costs,

⁹ Although not discussed at length in this correspondence, the arguments set forth in Section I.C. of this of this letter will also be presented, are similarly likely to succeed on the merits, and should factor into EPA’s evaluation of whether to grant the Coalition’s request for a stay.

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only to prevail in this appeal and find that the added expenditures were completely unnecessary. Balancing these harms against the prospect of simply maintaining the status quo of the 2003 MS4 Permit conditions pending the outcome of the appeal weighs heavily in the Massachusetts Petitioners' favor.

For these reasons, the Coalition, Franklin and Lowell respectfully request that the Region grant this request for a stay. The Coalition, Franklin and Lowell further request that the Region respond to this request by 4:00 p.m. EST on Thursday, June 12, 2017 so that we can know whether the Coalition, Franklin and Lowell must seek emergency relief in Court. We will treat the Region's failure to act upon this request within the requested time as a constructive denial.

Very truly yours,



Robert D. Cox, Jr.
Jennifer Garner
Attorneys for MCWRS



Michael A. Leon
Matthew J. Connolly
Attorneys for the City of Lowell



Mark G. Cerel
Attorney for the Town of Franklin

RDCJR:mm

cc: Kate R. Bowers, Trial Attorney, USDOJ *via email* kate.bowers@usdoj.gov
Martin Suuberg, Commissioner, MassDEP *via email* martin.suuberg@state.ma.us
Benjamin J. Ericson, General Counsel, MassDEP
via email benjamin.ericson@state.ma.us

Meeting Notes

EPA - MassDEP MS4 Coordination Meeting

May 18th 2017, at EPA

Attendees: Susy King (via telephone), Fred Civian, Kristi Rea, Thelma Murphy, Anne Leiby

1. Next meeting:

- Location: MA DEP
 - Next Meeting Date: June 12
 - Regular Meeting Schedule: second Monday of every month; alternating between agencies
 - Time: 11:00-12:30
 - Agenda*: draft to be distributed by MassDEP
 - Meeting notes* – to be written by MassDEP
- (* We agreed to share these duties and that the agency that is hosting the meeting will take the lead for: getting room, drafting agenda and compiling meeting notes.)

2. Stormwater News:

- Current (first) issue:
 - MassDEP reviewing and hoped to get to EPA by end of last week/early this week.
 - Once state gets its final comments back to EPA, EPA will incorporate those changes into final design.
 - EPA will let MassDEP know, via email, one day before the final version of Stormwater News will be sent out to MS4s in MA.
 - EPA is sharing its MS4 list with MassDEP – feel free to let us know if we need to add any names.
 - EPA will send email out from its: StormwaterNewsMA email box.
 - The text of the email will include the exact language from paragraph one, column one of the front page of SW News and then will attach SW News to the email
- Subsequent Issues:
 - We all agreed that we need to incorporate more time for review and design by all levels within both agencies
 - We will determine collectively as we go forward how we will respond to emails that we get in response to SW News. EPA will collect and share questions with DEP.
 - Issue 2:
 - Topic: NOI – EPA will take lead on first draft and share with MassDEP by June 9th (will include: trainings, common questions, etc.)
 - MassDEP – will review and get comments back to EPA by June 26th.
 - EPA will get designed version back to MassDEP by July 10
 - MassDEP will send any final comments by July 14th.
 - EPA will email out by July 19th.
 - Future topics:
 - October issue: 1st year requirements (“you just completed your NOI, now what for the next year?”)
 - January issue: Municipal budgets (with possible financing component)
 - April, 2018 issue: AR, IDDE plan

3. Communications Between Agencies:

- One Drive: all documents will be posted on One Drive and each agency will identify individuals who should have access.
- Calendar: Anne is working on setting up a calendar on the One Drive where both agencies can post MS4 outreach events
- Tools list: We agreed that in addition to posting events in a calendar, we would post a list of tools and documents that might be relevant for MA MS4s. Everyone can begin to add tools to the current document that is posted in One Drive.
- MassDEP would like to discuss more fully at next meeting, that proper agreements/protocols are in place so that agencies are in agreement before state-wide communications are distributed (do not want another AR reminder situation).

4. Next Meeting Agenda Topics:

- Stormwater Coalitions: Fred offered to talk more about the eight MA SW Coalitions
- Suzy: would like to talk more about protocols to ensure proper coordination between agencies
- Other topics as suggested by the group.

CAT - One Pager Report

Last Update: 04/04/2017

Municipal Separate Storm Sewer System (MS4) Permitting - David Webster (OEP)

HOT

BACKGROUND: Stormwater is the leading cause of water quality problems in Massachusetts and New Hampshire with waters impaired due to contaminated runoff. Tackling this problem is critical to cleaning up rivers, lakes, and ponds, and delivering clean water. There are five existing or planned MS4 permits in Massachusetts and New Hampshire: Boston, Worcester, Massachusetts Department of Transportation, and two general permits that cover remaining communities in Massachusetts and New Hampshire that require stormwater permits.

STATUS OF WORK: A final MA MS4 General Permit was issued in April 2016. A final NH Small MS4 General Permit was issued in January 2017. EPA is working on draft permits for MassDOT and Boston and a final or re-draft for Worcester. The MA MS4 GP has been challenged by the Center for Regulatory Reasonableness and four other parties. The case has been consolidated in the DC Circuit Court and is awaiting briefing schedules from the court. Two petitions for review of the NH Small MS4 general permit have been filed so far by the Conservation Law Foundation (in the First Circuit Court of Appeals) and CRR (in the D.C. Circuit; on March 24, 2017, CLF moved to intervene in the CRR's D.C. Circuit petition). Parties have until June 1, 2017 to file an appeal. EPA has moved to transfer CLF's petition in the First Circuit to the D.C. and consolidate it with CRR's petition. CLF has objected to the transfer and argues that all petitions filed on the NH small MS4 GP must be heard in the First Circuit. On March 29, 2017, EPA filed a motion in the D.C. Circuit to hold the matter in abeyance for 90 days, that is, until June 29, 2017. A 90-day stay of proceedings would allow time for any additional petitions for review of the EPA action at issue in this case to be filed before any further proceedings take place. If granted, this motion would extend the deadline for dispositive motions and the certified index to the administrative record to July 16, 2017. Otherwise the deadline for dispositive motions and the certified index will be April 17, 2017.

On March 30, 2017, the D.C. Circuit established a briefing schedule for the MA MS4 appeal. Petitioner's briefs are due May 8, 2017. EPA's brief is due July 24, 2017. Final briefs are due September 28, 2017. ORC, OGC, and DOJ are anticipating a meeting during the week of April 3 to discuss options and develop a strategy regarding ADR.

SENSITIVE ISSUES: There is often keen municipal, state, non-government organization (NGO), and congressional interest in MA and NH municipal permits. In a March 9, 2017, letter to Administrator Pruitt, NH Governor Sununu raised concerns about the cost to municipalities of complying with the small MS4 permit and invited the Administrator to come to NH to meet with local and state leaders who would be impacted by the permit. In a January 25, 2017, letter to Administrator Pruitt, CRR raised concerns about the permit's cost to municipalities in both NH and MA as well as the science supporting the permits and requested the new administration review these MS4 permits.

In MA and NH, currently EPA Region 1 has the sole responsibility of issuing, justifying, and defending limits in a litigious atmosphere that is charged with public, financial, and environmental interests. Issues include whether the permit is adequately protective, affordable, and/or defensible under the law. The Region is currently considering whether to seek an assessment of the viability of alternative dispute resolution (ADR) to assist in the resolution of these two cases.

PARTNERS: MA, NH

Date	Milestone	Status
05/08/2017	Petitioners' briefs due in MA small MS4 permit appeal	Planned
06/30/2017	Issue Draft MassDOT MS4 permit.	Planned
07/17/2017	Submission of certified index of the record for the NH small MS4 General Permit to court	Planned
07/24/2017	EPA's brief due in MA small MS4 permit appeal	Planned
08/08/2017	Intervenors' briefs due in MA small MS4 permit appeal	Planned
09/29/2017	Issue Draft Boston MS4 permit.	Planned



Completing a "Notice of Intent for Approval to Discharge" under the 2016 Massachusetts Small MS4 General Permit



Who must file an Notice of Intent (NOI)?

- A municipality operating a small municipal separate storm sewer system (MS4) under the 2003 MA MS4 permit
- A municipality newly designated as a small MS4 under the 2010 Census
- A “Non-traditional” publically owned and/or operated MS4. Examples include:
 - Hospitals
 - Prisons
 - Military Bases
 - Airports
 - Universities
 - Federal facilities
 - Highways or other thoroughfares



If in Doubt...

Refer to regulated area maps located
here:

<https://www3.epa.gov/region1/npdes/stormwater/ma.html>



Key NOI Facts

- The NOI notifies permitting authorities that you intend to seek authorization to discharge from an MS4 to surface waters
- The 2016 permit goes into effect on July 1, 2017
- **File your NOI by September 29, 2017 or your town loses permit coverage for MS4 discharges**



NOI Overview

Part I – General Conditions

Part II – Summary of Receiving Waters

Part III – Stormwater Management Program
Summary

Part IV – Notes and Additional Information

Part V - Certification



Notice of Intent (NOI) for coverage under Small MS4 General Permit

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Part I: General Conditions

General Information

Name of Municipality or Organization: State

EPA NPDES Permit Number:

Primary MS4 Program Manager Contact Information

Name: Title:

Street Address Line 1

Street Address Line 2

City State Zip Code

Email: Phone Number:

Fax Number:

See **Appendix E** for the NOI template, which can be filled out on a computer or by hand:
<https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/appendix-e-2016-ma-sms4-gp-print.pdf>

About EPA New England

A-Z Index

NPDES Home

NPDES Stormwater Permit Home

Stormwater in My State

Municipal (MS4) Program

Industrial Program

Construction Program

Massachusetts Small MS4 General Permit

You will need Adobe Reader to view some of the files on this page. See [EPA's PDF page](#) to learn more about PDF, and for a link to the free Acrobat Reader.

****New Tools Available, click here or scroll to bottom of page.****

The 2016 Massachusetts Small MS4 General Permit was signed April 4, 2016 and will become effective July 1, 2017. The final permit reflects modifications to the 2014 draft small MS4 general permit released for comment on September 30, 2014 and replaces the 2003 small MS4 general permit for MS4 operators within the Commonwealth of Massachusetts. The permit, appendices, and response to comment documents are available below.

2016 Final Permit Documents

- [Federal Register Notice](#)
- [Final 2016 Massachusetts Small MS4 General Permit \(PDF\)](#) (60 pp, 735 K)
- [Appendix A - Definitions, Abbreviations and Acronyms \(PDF\)](#) (8 pp, 48 K)
- [Appendix B - Standard Permit Conditions \(PDF\)](#) (10 pp, 51 K)
- [Appendix C - Endangered Species Act Eligibility Guidance \(PDF\)](#) (8 pp, 69 K)
- [Appendix D - National Historic Preservation Act Eligibility Guidance \(PDF\)](#) (4 pp, 67 K)
- [Appendix E - Suggested Format and Required Information for the Notice of Intent \(NOI\) - Printable \(PDF\)](#) (15 pp, 740 K)
- [Suggested Template - Appendix E - Notice of Intent \(NOI\) \(PDF\)](#) (18 pp, 407 K)
- [Appendix F - Requirements of Approved Total Maximum Daily Loads \(PDF\)](#) (140 pp, 2.3 MB)
- [Appendix G - Impaired Waters Monitoring Parameter Requirements \(PDF\)](#) (3 pp, 64 K)
- [Appendix H - Requirements Related to Discharges to Certain Water Quality Limited Waterbodies \(PDF\)](#) (26 pp, 630 K)
- [Response to Comments \(PDF\)](#) (632 pp, 5.2 MB)

2010 Census and Designated MS4s

Right
Click..."Save
Link As"



Part I – General Conditions

Notice of Intent (NOI) for coverage under Small MS4 General Permit Page 1 of 18

Part I: General Conditions

General Information

Name of Municipality or Organization: State:

EPA NPDES Permit Number (if applicable):

Primary MS4 Program Manager Contact Information

Name: Title:

Street Address Line 1:

Street Address Line 2:

City: State: Zip Code:

Email: Phone Number:

Fax Number:

Other Information

Stormwater Management Program (SWMP) Location (web address or physical location, if already completed):

Eligibility Determination

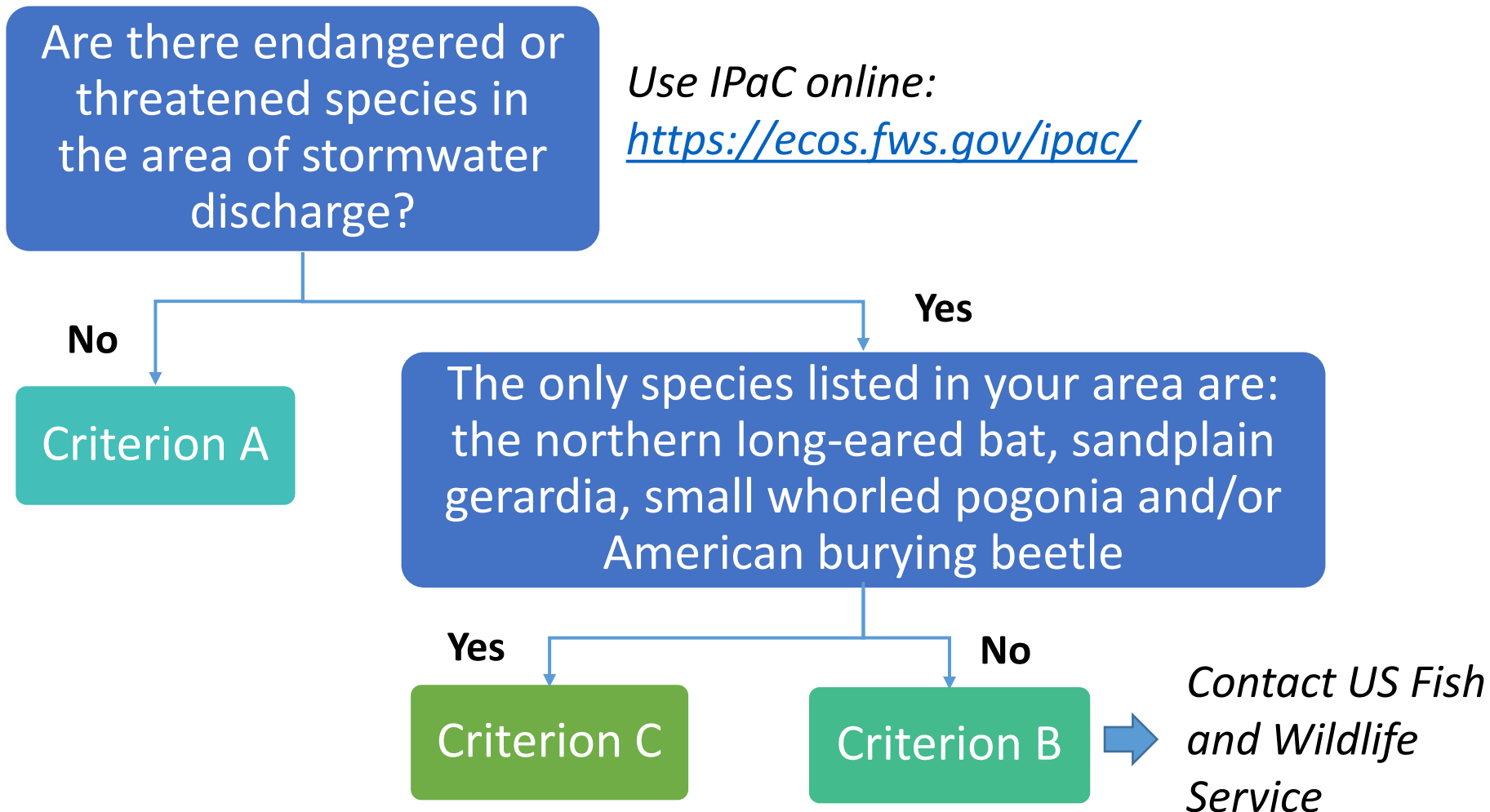
Endangered Species Act (ESA) Determination Complete?

National Historic Preservation Act (NHPA) Determination Complete?

Eligibility Criteria (check all that apply): ☐ A ☐ B ☐ C

Eligibility Criteria (check all that apply): ☐ A ☐ B ☐ C

Eligibility Determination: Endangered Species Act (ESA)



Secure | https://ecos.fws.gov/ipac/location/index

U.S. Fish & Wildlife Service

IPaC Information for Planning and Consultation

IPaC Information for Planning and Consultation

WETLANDS

PRINT RESOURCE LIST

What's next?

Define a project at this location to evaluate potential impacts, get an official species list, and make species determinations.

DEFINE PROJECT

The following species are potentially affected by activities in this location.

THUMBNAILS

LIST

Flowering Plants

Threatened



Small Whorled Pogonia
Isotria medeoloides

Mammals

Threatened

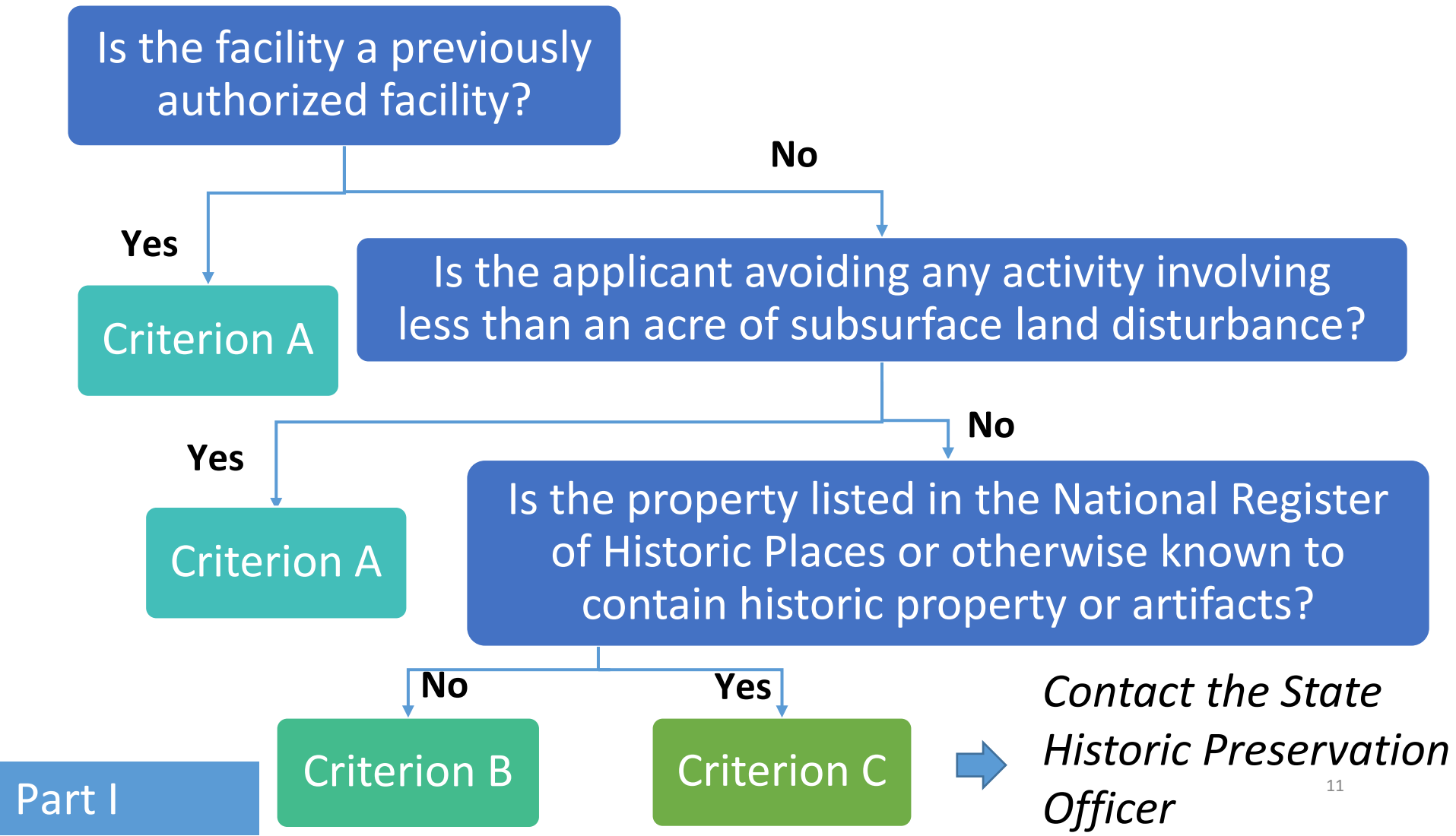


Northern Long-eared Bat
Myotis septentrionalis

10



Eligibility Determination: National Historic Preservation Act (NHPA)





Part I – General Conditions

Notice of Intent (NOI) for coverage under Small MS4 General Permit Page 1 of 18

Part I: General Conditions

General Information

Name of Municipality or Organization: State:

EPA NPDES Permit Number (if applicable):

Primary MS4 Program Manager Contact Information

Name: Title:

Street Address Line 1:

Street Address Line 2:

City: State: Zip Code:

Email: Phone Number:

Fax Number:

Other Information

Stormwater Management Program (SWMP) Location
(web address or physical location, if already completed):

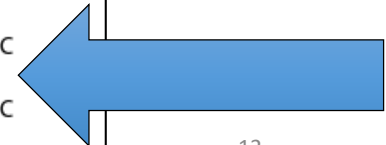
Eligibility Determination

Endangered Species Act (ESA) Determination Complete?

National Historic Preservation Act (NHPA) Determination Complete?

Eligibility Criteria
(check all that apply): ☐ A ☐ B ☐ C

Eligibility Criteria
(check all that apply): ☐ A ☐ B ☐ C



Part I – General Conditions

☒ Check the box if your municipality or organization was covered under the 2003 MS4 General Permit

MS4 Infrastructure (If covered under the 2003 permit)

Estimated Percent of Outfall Map Complete?
(Part II, III, IV or V, Subpart B.3.(a.) of 2003 permit)

If 100% of 2003 requirements not met, enter an estimated date of completion (MM/DD/YY):

Web address where MS4 map is published:

If outfall map is unavailable on the internet an electronic or paper copy of the outfall map must be included with NOI submission (see section V for submission options)

Regulatory Authorities (If covered under the 2003 permit)

Illicit Discharge Detection and Elimination (IDDE) Authority Adopted?
(Part II, III, IV or V, Subpart B.3.(b.) of 2003 permit)

Effective Date or Estimated Date of Adoption (MM/DD/YY):

Construction/Erosion and Sediment Control (ESC) Authority Adopted?
(Part II, III, IV or V, Subpart B.4.(a.) of 2003 permit)

Effective Date or Estimated Date of Adoption (MM/DD/YY):

Post-Construction Stormwater Management Adopted?
(Part II, III, IV or V, Subpart B.5.(a.) of 2003 permit)

Effective Date or Estimated Date of Adoption (MM/DD/YY):

Part II – Summary of Receiving Waters

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Notice of Intent (NOI) for coverage under Small MS4 General Permit

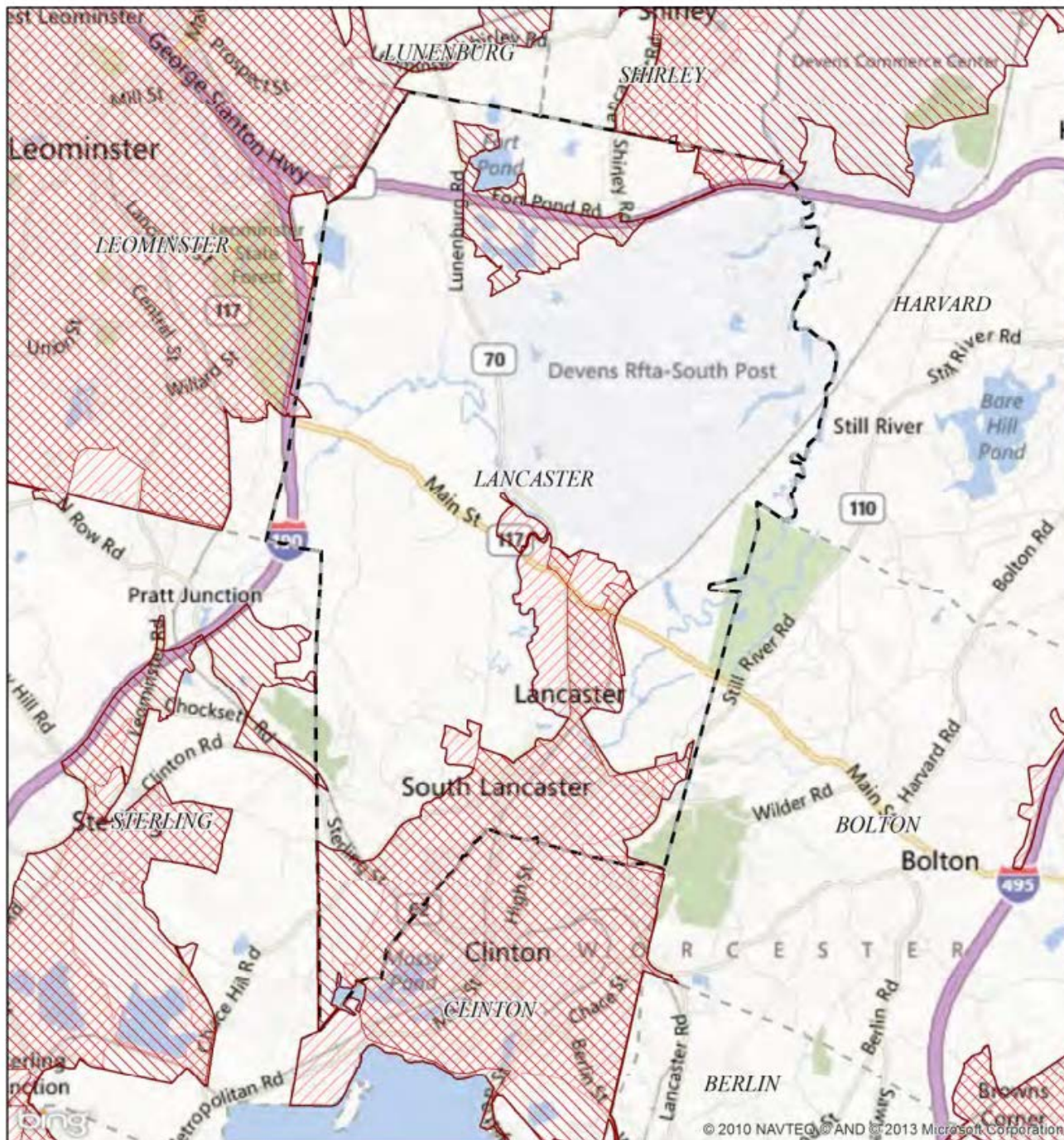
Part II: Summary of Receiving Waters

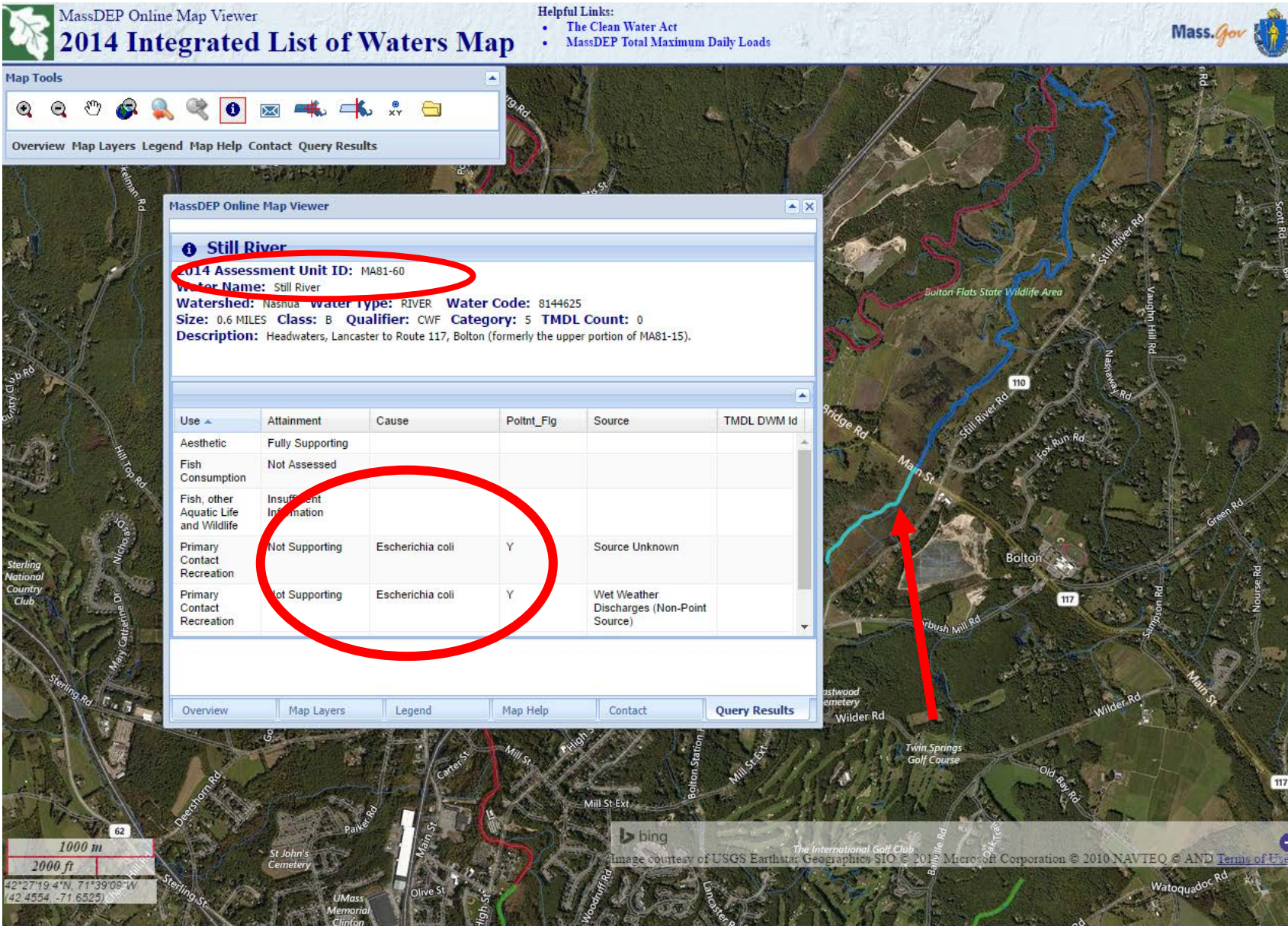
Please list the waterbody segments to which your MS4 discharges. For each waterbody segment, please report the number of outfalls discharging into it and, if applicable, any impairments.

Massachusetts list of impaired waters: [Massachusetts 2014 List of Impaired Waters- http://www.mass.gov/eea/docs/dep/water/resources/07v5/14list2.pdf](http://www.mass.gov/eea/docs/dep/water/resources/07v5/14list2.pdf)

Check off relevant pollutants for discharges to impaired waterbodies (see above 303(d) lists) without an approved TMDL in accordance with part 2.2.2.a of the permit. List any other pollutants in the last column, if applicable.

Waterbody segment that receives flow from the MS4	Number of outfalls into receiving water segment	Chloride	Chlorophyll-a	Dissolved Oxygen/DO Saturation	Nitrogen	Oil & Grease/ PAH	Phosphorus	Solids/ TSS/ Turbidity	E. coli	Enterococcus	Other pollutant(s) causing impairments
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Part III – Stormwater Management Program

Identify the BMPs used to address each
of six Minimum Control Measures
(MCMs) and Total Maximum Daily Loads
(TMDLs) requirements

MCM 1 - Public Education & Outreach

Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary

Identify the Best Management Practices (BMPs) that will be employed to address each of the six Minimum Control Measures (MCMs). For municipalities/organizations whose MS4 discharges into a receiving water with an approved Total Maximum Daily Load (TMDL) and an applicable waste load allocation (WLA), identify any additional BMPs employed to specifically support the achievement of the WLA in the TMDL section at the end of part III.

For each MCM, list each existing or proposed BMP by category and provide a brief description, responsible parties/departments, measurable goals, and the year the BMP will be employed (public education and outreach BMPs also requires a target audience). **Use the drop-down menus in each table or enter your own text to override the drop down menu.**

MCM 1: Public Education and Outreach

BMP Media/Category (enter your own text to override the drop down menu)	BMP Description	Targeted Audience	Responsible Department/Parties (enter your own text to override the drop down menu)	Measurable Goal	Beginning Year of BMP Implementation
		Residents			
		Institutions and facilities			
Brochures/Pamphlets		Developers (construction)			
Contests		Industrial Facilities			
Displays/Posters/Kiosks		Residents			
Local Public Service Announcements					
Meeting					
Newspaper Articles/Press Releases					
School Curricula/Programs					
Special Events/Festivals/Fairs		Developers (construction)			
		Industrial Facilities			



MCM 2 - Public Involvement and Participation

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Part III: Stormwater Management Program Summary (continued)

MCM 2: Public Involvement and Participation

BMP Categorization	Brief BMP Description (enter your own text to override the drop down menu)	Responsible Department/Parties (enter your own text to override the drop down menu)	Additional Description/ Measurable Goal	Beginning Year of BMP Imple- mentation
Public Review	SWMP Review	Planning/zoning Department	Allow annual review of stormwater management plan and posting of stormwater management plan on website	2017
Public Participation	Hotline/webline - reporting problems/violations		Allow public to comment on stormwater management plan annually	
	Household haz. waste/used oil collection			
	Infoline - general stormwater info			
	Partnership - Advocacy Groups			
	Partnership - Business/Industry			
	Public Meeting - Stormwater			
	Public Surveys - Opinions, behaviors, etc.			
	Stormwater Committee/Task Force			
	SWMP Review			





MCM 3 - Illicit Discharge Detection & Elimination

Notice of Intent (NOI) for coverage under Small MS4 General Permit				
Part III: Stormwater Management Program Summary (continued)				
MCM 3: Illicit Discharge Detection and Elimination (IDDE)				
BMP Categorization (enter your own text to override the drop down menu)	BMP Description	Responsible Department/Parties (enter your own text to override the drop down menu)	Measurable Goal (all text can be overwritten)	Beginning Year of BMP Implementation
SSO inventory	Develop SSO inventory in accordance of permit conditions		Complete within 1 year of effective date of permit	
Storm sewer system map	Create map and update during IDDE program completion		Update map within 2 years of effective date of permit and complete full system map 10 years after effective date of permit	
Written IDDE program	Create written IDDE program		Complete within 1 year of the effective date of permit and update as required	
Implement IDDE program	Implement corrective investigation to program and conditions		Complete 10 years after effective date of permit	
Employee training	Train employees on IDDE implementation		Train annually	
Conduct dry weather screening	Conduct in accordance with outfall screening procedure and permit conditions		Complete 3 years after effective date of permit	
Conduct wet weather screening	Conduct in accordance with outfall screening procedure		Complete 10 years after effective date of permit	
Ongoing screening	Conduct dry weather and wet weather screening (as necessary)		Complete ongoing outfall screening upon completion of IDDE program	

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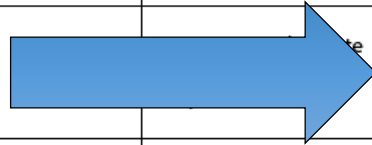
MCM 3 - Illicit Discharge Detection & Elimination

Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary (continued)

MCM 3: Illicit Discharge Detection and Elimination (IDDE)

BMP Categorization (enter your own text to override the drop down menu)	BMP Description	Responsible Department/Parties (enter your own text to override the drop down menu)	Measurable Goal (all text can be overwritten)	Beginning Year of BMP Imple- mentation
SSO inventory	Develop SSO inventory in accordance of permit conditions		Complete within 1 year of effective date of permit	
Storm sewer system map			Update map within 2 years of effective date of permit and complete full system map 10 years after effective date of permit	
Written IDDE program	Create written IDDE program	Building Permitting and Enforcement Conservation Committee	Complete within 1 year of the effective date of permit and update as required	
Implement IDDE program	Implement catchment investigations according to program and permit conditions	DPW Construction DPW Operations Engineering Environment Department	Complete 10 years after effective date of permit	
Employee training	Train employees on IDDE implementation	External Contractor Health Department	Train annually	
Conduct dry weather screening	Conduct in accordance with outfall screening procedure and permit conditions		Complete 3 years after effective date of permit	
Conduct wet weather screening	Conduct in accordance with outfall screening procedure		Complete 10 years after effective date of permit	
Ongoing screening	Conduct dry weather and wet weather screening (as necessary)		Complete ongoing outfall screening upon completion of IDDE program	



MCM 4 - Construction Site Stormwater Control

Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary (continued)

MCM 4: Construction Site Stormwater Runoff Control

BMP Categorization (enter your own text to override the drop down menu or entered text)	BMP Description	Responsible Department/Parties (enter your own text to override the drop down menu)	Measurable Goal (all text can be overwritten)	Beginning Year of BMP Implementation
Site inspection and enforcement of Erosion and Sediment Control (ESC) measures	Complete written procedures of site inspections and enforcement procedures		Complete within 1 year of the effective date of permit	
Site plan review	Complete written procedures of site plan review and begin implementation		Complete within 1 year of the effective date of permit	
Erosion and Sediment Control	Adoption of requirements for construction operators to implement a sediment and erosion control program			
Waste Control	Adoption of requirements to control wastes, including but not limited to, discarded building materials, concrete truck wash out, chemicals, litter, and sanitary wastes	<div> <div>Building Permitting and Enforcement</div> <div>Conservation Committee</div> <div>DPW Construction</div> <div>DPW Operations</div> <div>Engineering</div> <div>Environment Department</div> <div>External Contractor</div> <div>Health Department</div> </div>	Complete within 1 year of the effective date of permit	



MCM 5 - Post-Construction Stormwater Management in New Development and Redevelopment

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Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary (continued)

MCM 5: Post-Construction Stormwater Management in New Development and Redevelopment

BMP Categorization (enter your own text to override the drop down menu or entered text)	BMP Description	Responsible Department/Parties (enter your own text to override the drop down menu)	Measurable Goal (all text can be overwritten)	Beginning Year of BMP Implementation
As-built plans for on-site stormwater control	The procedures to require submission of as-built drawings and ensure long term operation and maintenance will be a part of the SWMP		Require submission of as-built plans for completed projects	
Target properties to reduce impervious areas	Identify at least 5 permittee-owned properties that could be modified or retrofitted with BMPs to reduce impervious areas and update annually		Complete 4 years after retrofitted properties	
Allow green infrastructure	Develop a report assessing existing local regulations to determine the feasibility of making green infrastructure practices allowable when appropriate site conditions exist		Complete 4 years after effective date of permit and implement recommendations of report	





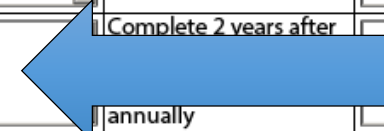
MCM 6 - Municipal Good Housekeeping

Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary (continued)

MCM 6: Municipal Good Housekeeping and Pollution Prevention

BMP Categorization (enter your own text to override the drop down menu or entered text)	BMP Description	Responsible Department/Parties (enter your own text to override the drop down menu)	Measurable Goal (all text can be overwritten)	Beginning Year of BMP Imple- mentation
O&M procedures	Create written O&M procedures including all requirements contained in 2.3.7.a.ii for parks and open spaces, buildings and facilities, and vehicles and equipment		Complete and implement 2 years after effective date of permit	
Inventory all permittee-owned parks and open spaces, buildings and facilities, and vehicles and equipment	Create inventory		Complete 2 years after	
Infrastructure O&M	Establish and implement program for repair and rehabilitation of MS4 infrastructure		annually	
Stormwater Pollution Prevention Plan (SWPPP)	Create SWPPPs for maintenance garages, transfer stations, and other waste-handling facilities		Complete 2 years after effective date of permit	



Actions for Meeting Total Maximum Daily Load (TMDL) Requirements


Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary (continued)

Actions for Meeting Total Maximum Daily Load (TMDL) Requirements

Use the drop-down menus to select the applicable TMDL, action description to meet the TMDL requirements, and the responsible department/parties. If no options are applicable, or more than one, **enter your own text to override drop-down menus**.

Applicable TMDL	Action Description	Responsible Department/Parties (enter your own text to override the drop down menu)
Lower Charles River (Phosphorus)		
Upper/Middle Charles River (Phosphorus)		
Long Island Sound TMDL (Nitrogen)		
Ten Mile River TMDL (Bacteria/Pathogen)		
Ten Mile River TMDL (Phosphorus)		
Ten Mile River TMDL (Metals)		
Charles River Watershed (Bactria/Pathogen)		
Frost Fish Creek (Bactria/Pathogen)		
Little Harbor (Bactria/Pathogen)		



MassGIS Map Tool: <http://maps.massgis.state.ma.us/images/dep/omv/il2014viewer.htm>

Actions for Meeting Total Maximum Daily Load (TMDL) Requirements

Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary (continued)

Actions for Meeting Total Maximum Daily Load (TMDL) Requirements

Use the drop-down menus to select the applicable TMDL, action description to meet the TMDL requirements, and the responsible department/parties. If no options are applicable, or more than one, **enter your own text to override drop-down menus**.

Applicable TMDL	Action Description	Responsible Department/Parties (enter your own text to override the drop down menu)
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	Adhere to requirements in part A.I of Appendix F	<input type="text"/>
<input type="text"/>	Adhere to requirements in part A.II of Appendix F	<input type="text"/>
<input type="text"/>	Adhere to requirements in part A.III of Appendix F	<input type="text"/>
<input type="text"/>	Adhere to requirements in part A.IV of Appendix F	<input type="text"/>
<input type="text"/>	Adhere to requirements in part A.V of Appendix F	<input type="text"/>
<input type="text"/>	Adhere to requirements in part B.I of Appendix F	<input type="text"/>
<input type="text"/>	Adhere to requirements in part B.II of Appendix F	<input type="text"/>
<input type="text"/>	Adhere to requirements in part B.III of Appendix F	<input type="text"/>
<input type="text"/>	Adhere to requirements in part B.IV of Appendix F	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>

Appendix F: <https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/appendix-f-2016-ma-sms4-gp.pdf>

Actions for Water Quality Limited Waters

Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary (continued)

Actions for Meeting Requirements Related to Water Quality Limited Waters

Use the drop-down menus to select the pollutant causing the water quality limitation and enter the waterbody ID(s) experiencing excursions above water quality standards for that pollutant. Choose the action description from the dropdown menu and indicate the responsible party. If no options are applicable, or more than one, **enter your own text to override drop-down menus.**

Pollutant	Waterbody ID(s)	Action Description	Responsible Department/Parties (enter your own text to override the drop down menu)
<div><div></div><div>E. Coli</div><div>Enterococcus</div><div>Fecal Coliform</div><div>Nitrogen</div><div>Phosphorus</div><div>TSS</div><div>Turbidity</div><div>Chloride</div><div>Cadmium</div><div></div></div>			



Actions for Water Quality Limited Waters

Notice of Intent (NOI) for coverage under Small MS4 General Permit

Part III: Stormwater Management Program Summary (continued)

Actions for Meeting Requirements Related to Water Quality Limited Waters

Use the drop-down menus to select the pollutant causing the water quality limitation and enter the waterbody ID(s) experiencing excursions above water quality standards for that pollutant. Choose the action description from the dropdown menu and indicate the responsible party. If no options are applicable, or more than one, **enter your own text to override drop-down menus.**

Pollutant	Waterbody ID(s)	Action Description	Responsible Department/Parties (enter your own text to override the drop down menu)
<input type="text"/>		<input type="text"/>	<input type="text"/>
<input type="text"/>		Adhere to requirements in part I of Appendix H	<input type="text"/>
<input type="text"/>		Adhere to requirements in part II of Appendix H	<input type="text"/>
<input type="text"/>		Adhere to requirements in part III of Appendix H	<input type="text"/>
<input type="text"/>		Adhere to requirements in part IV of Appendix H	<input type="text"/>
<input type="text"/>		Adhere to requirements in part V of Appendix H	<input type="text"/>
<input type="text"/>			<input type="text"/>
<input type="text"/>			<input type="text"/>
<input type="text"/>			<input type="text"/>

Appendix H: <https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/appendix-h-2016-ma-sms4-gp.pdf>



Part IV – Notes and Additional Information

Page # of ##

Notice of Intent (NOI) for coverage under Small MS4 General Permit (continued)

Part IV: Notes and additional information

Use the space below to provide any additional information about your MS4 program

Click to add text

Part V - Certification

Page # of ##

Notice of Intent (NOI) for coverage under Small MS4 General Permit (continued)

Part V: Certification

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, I certify that the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Name:

Title:

Signature Field

Date:

NOI Submission

Please submit the form electronically via email using the "submit by Email" button below or send in a CD with your completed NOI. You may also print and submit via mail at the address below if you choose not to submit electronically. Outfall map required in Part I of the NOI (if applicable) can be submitted electronically as an email attachment OR as a paper copy.

Permittees that choose to submit their NOI electronically by email or by mailing a CD with the completed NOI form to EPA, will be able to download a partially filled Year 1 Annual Report at a later date from EPA.

Submit by Email

Submit by email using this button. Or, send an email with attachments to: stormwater.reports@epa.gov

Save

Save NOI for your records

EPA Submittal Address:

United States Environmental Protection Agency
5 Post Office Square - Suite 100
Mail Code - OEP06-1
Boston, Massachusetts 02109-3912
ATTN: Newton Tedder

State Submittal Address

Massachusetts Department of Environmental Protection
One Winter Street - 5th Floor
Boston, MA 02108
ATTN: Fred Civian



The NOI is due by mail or email within **90 days**
of the effective date of the 2016 permit:
September 29, 2017

Email the NOI and its attachments to:
stormwater.reports@epa.gov

OR

Mail the NOI and its attachments to EPA and
MA DEP at the addresses set out in the NOI.

Save a copy for your records!

Resource List

- Interactive NOI:
<https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/appendix-e-2016-ma-sms4-gp.pdf>
- MA MS4 2016 Permit, Appendices, and related materials:
https://www3.epa.gov/region1/npdes/stormwater/MS4_MA.html
- Maps of regulated areas: <https://www3.epa.gov/region1/npdes/stormwater/ma.html>
- For ESA: FWS IPaC Tool: <https://ecos.fws.gov/ipac/>
- For NHPA: Project Notification Form:
<http://www.sec.state.ma.us/mhc/mhcform/formidx.htm>
- List of MA impaired waters:
www.mass.gov/eea/docs/dep/water/resources/07v5/14list2.pdf
- MassGIS impaired waters & TMDL map tool:
<http://maps.massgis.state.ma.us/images/dep/omv/il2014viewer.htm>
- MA DEP Municipal Stormwater webpage:
<http://www.mass.gov/eea/agencies/massdep/water/wastewater/stormwater.html#8>

Background of New Hampshire MS4 General Permit Dispute

- EPA signed the final New Hampshire Small Municipal Separate Storm Sewer System (MS4) permit on January 18, 2017. The permit, response to comments, and other supporting materials are posted on Region 1's website. https://www3.epa.gov/region1/npdes/stormwater/MS4_NH.html The signed prepublication FR notice of availability of the permit is also posted on the website and states that parties have 120 days to seek judicial review beginning February 1.
- The permit covers municipal stormwater discharges from New Hampshire municipalities. Municipalities can elect coverage under this general permit or may request an individual permit.
- EPA took comments on the draft permit from February 12 to August 15, 2013 after two comment period extensions. In 2015, EPA edited select sections of the 2013 draft permit and reopened these sections for comment from September 1 to November 2, 2015. EPA then took comments on the comments received during the last comment period until November 20, 2015.
- Commenters included MS4 operators, local watershed groups, lawyers representing MS4 operators, environmental non-profit groups, and citizens. Commenters expressed a variety of views on the individual requirements of the permit, their flexibility, feasibility, protectiveness, and affordability. EPA has responded to all comments.
- The conditions in the general permit are established pursuant to Clean Water Act (CWA) section 402(p)(3)(B)(iii) to ensure that pollutant discharges from small MS4s are reduced to the Maximum Extent Practicable (MEP), protect water quality, and satisfy the appropriate requirements of the CWA.
- EPA received state CWA § 401 water quality certification for the General Permit from the New Hampshire Department of Environmental Services (NHDES), as well as federal consistency determinations from the National Marine Fisheries Service, U.S. Fish and Wildlife, and the New Hampshire Coastal Zone Management office.
- EPA Region 1 issued a similar Massachusetts Small MS4 general permit in April 2016. A consolidated appeal from multiple petitioners, including the Center for Regulatory Reasonableness, Conservation Law Foundation, Massachusetts Coalition for Water Resources Stewardship, National Association of Homebuilders, and two Massachusetts municipalities is pending in the U.S. Court of Appeals for the District of Columbia. A briefing schedule has not been set.

Use of ADR for MS4 Permit Issues

For EPA purposes, ADR is the use of mediation (use of a mediator to assist the parties in coming to an agreement). The mediator does not issue any findings or decisions.

- ADR is voluntary. Each of the parties to a dispute must be interested in exploring the possibility of resolving a dispute with the process assistance of a mutually acceptable mediator. Any party can withdraw from the process at any time during the process. Each of the parties has to weigh the incentives and disincentives of dialogue against their other legal and procedural options.

- ADR should involve all affected parties who would need to participate in resolving the issues and implementing the solution. ADR generally involves representatives of the clients in addition to the attorneys of record.
- ADR discussions for settlement are confidential, unless there is a need to have a more public dialogue process.
- ADR is a phased process.
 1. The first step is for an EPA CPRC mediator to contact each of the parties separately and confidentially to determine whether they believe that participating in an assisted negotiation process is in their interests.
 2. If each of the parties is willing, CPRC works with the parties to identify and retain a mutually acceptable third party mediator. We have a national contract vehicle that the parties can use to identify and retain the mediator. Funding is provided by the EPA client office. In some cases funding of the mediator's fee can be shared among the parties to the mediation.
 3. Once the parties have worked through the mediator selection process, the mediator works with each party separately and confidentially to design a process that the parties feel can be accomplished in a fair and timely manner.
 4. The parties generally work with the selected mediator to enter into a mediation agreement which sets out the roles of each party, timelines and a general design for the mediation process.
 5. The parties, working with the mediator, work through the discussion and resolution of the issues. The mediator may assist in drafting up a single text agreement or may advise the parties in drafting up an agreement themselves.

Many elements of entering into an ADR process are the same whether the process is conducted pre-litigation or while litigation is on-going.

- If litigation is on-going, the parties may need to consider Federal Court mediation rules or procedures and jointly work through litigation deadlines with each other and the Court.
- If mediation is conducted in a case in federal court, the Department of Justice may have resources to pay part or all of the mediator's fee.
- If the ADR process is pre-litigation it can be designed either as private pre-settlement discussions, or a more public dialogue, depending on the needs of the parties and the specific issues under consideration.

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